IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

ANDERSON DIVISION

IN RE: 2019-MISC-Two Civil Investigative Demands dated 01/29/2019 Issued by the Consumer Financial Protection Bureau,	Civil Action No.: 6:19-mc-00254-DCC **JOINT MOTION TO QUASH CIVIL INVESTIGATIVE DEMANDS**

Pursuant to Federal Rule of Civil Procedure 45, Candy Kern-Fuller ("Kern-Fuller") and Howard E. Sutter, III ("Sutter"), through their respective attorneys, respectfully move to quash two Civil Investigative Demands for the provision of oral testimony issued to them by the Consumer Financial Protection Bureau, and for other and further relief as the Court deems just and proper. In support, Kern-Fuller and Sutter submit a Memorandum of Law in Support of the Motion to Quash dated July 22, 2019, which is incorporated below.

Respectfully submitted,

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July 24, 2019
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

ANDERSON DIVISION

IN RE: 2019-MISC-Two Civil Investigative Demands dated 01/29/2019 Issued by the Consumer Financial Protection Bureau,	Civil Action No.: 6:19-mc-00254-DCC **MEMORANDUM OF LAW IN SUPPORT OF MOTION TO QUASH CIVIL INVESTIGATIVE DEMANDS**

Candy Kern-Fuller and Howard E. Sutter III (collectively hereinafter "Movants") respectfully submit this Memorandum of Law in support of their Motion to Quash the Civil Investigative Demands ("CIDs") served on Movants on February 12, 2019 by the Consumer Financial Protection Bureau ("Bureau" or "CFPB") (*See* Attached **Exhibits "A" and "B"**). The notices of investigative hearings issued seeking Movant's testimony on August 9 and 8, 2019 respectively. (*See* Attached **Exhibits "C" and" D"**). The CIDs should be quashed or otherwise set aside because (1) the Bureau's structure violates the separation of powers, and it therefore, may not constitutionally undertake to execute the laws or investigate violations thereof; (2) the CFPB has already filed an action under the federal consumer financial laws regarding this investigation, and therefore lacks the power to issue the instant CIDs; and (3) the practice of law exclusion in the Consumer Financial Protection Act renders the CIDs invalid.

<u>JURISDICTIONAL/FACTUAL BACKGROUND</u>

On February 12, 2019, the Bureau issued two CIDs to Movants seeking oral testimony. Movants are both licensed attorneys practicing as partners in the Upstate Law Group, LLC in Pickens County, South Carolina. Kern-Fuller resides in Anderson County, South Carolina. Sutter

resides in Pickens County, South Carolina. This Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §1331 (federal question jurisdiction) and venue in this Division is proper based upon the residences and business locations of the Movants.

The CIDs issued to the Movants contained Notifications of Purpose, which stated:

> The purpose of this investigation is to determine whether persons that purport to acquire the rights to veterans' military pensions or other benefits in exchange for lump-sums are offering to extend credit or extending credit. The purpose of this investigation is also to determine whether, in connection with offering or collecting on these products, such persons have engaged in unfair, deceptive, or abusive acts or practices in violation of §§ 1031 and 1036 of the Consumer Financial Protection Act of 2010, 12 U.S.C. §§ 5531, 5536.

The CIDs also advised the recipients that the investigation sought "to determine whether Bureau action to obtain legal or equitable relief would be in the public interest." According to the CIDs, Sutter was required to provide oral testimony on February 28, 2019, and Kern-Fuller was required to do so on March 1, 2019. Kern-Fuller and Sutter timely filed their Petition to Modify or Set Aside the CIDs with the Bureau on February 15, 2019.

Pursuant to § 1052(f)(1) of the Consumer Financial Protection Act of 2010 ("CFPA") and 12 C.F.R. § 1080.6(e)(4), the Director of the Bureau, Kathleen L. Kraninger, determined that the aforementioned Notification of Purpose in the CIDs did not comport with the Bureau's recently changed standard. On April 25, 2019, Kraninger modified the Notifications of Purpose as follows:

> The purpose of this investigation is to determine whether persons that purport to acquire the rights to veterans' military pensions or other benefits in exchange for lump-sums are offering to extend credit or extending credit. The purpose of this investigation is also to determine whether, in connection with offering or collecting on these products, such persons have engaged in unfair, deceptive, or abusive acts or practices in violation of §§ 1031 and 1036 of the Consumer Financial Protection Act of 2010, 12 U.S.C. §§ 5531, 5536. The purpose of this investigation is also to determine whether Bureau action to obtain legal or equitable relief would be in the public interest.

After this modification, the Bureau did not set aside or further modify the CIDs. Despite the fact that Movants ended their participation in the transactions that were the subject of the CIDs as of July 1, 2018, the Bureau has notified counsel for both Ms. Kern-Fuller and Mr. Sutter that it intends to take their oral testimony at "investigational hearings" on August 8 and 9, 2019 scheduled to take place at the United States Attorney's Office in Columbia.[1] Given that they have exhausted the remedies available to them before the CFPB, Ms. Kern-Fuller and Mr. Sutter now seek relief from this Court.

STANDARD OF REVIEW

It is well-established that, in order to enforce an administrative subpoena, a district court must first determine whether "(1) *the subpoena is within the statutory authority of the agency*; (2) the information sought is reasonably relevant to the inquiry; and (3) the demand is not unreasonably broad or burdensome." *United States v. Westinghouse Elec. Corp.*, 788 F.2d 164, 166 (3d Cir. 1986) (emphasis added); *see also Morton Salt*, 338 U.S. at 652–53 (same). The burden of demonstrating that the subpoena or CID is within the agency's statutory authority falls squarely on the CFPB. *See Chao v. Cmty. Trust Co.*, 474 F.3d 75, 79 (3d Cir. 2007).

The district court's role in assessing the agency's asserted authority is not that of a "mere rubber stamp," but rather of "an independent reviewing authority called upon to insure [sic] the integrity of the proceeding." *FDIC v. Wentz*, 55 F.3d 905, 908 (3d Cir. 1995) (affirming District Court's denial of agency's request for enforcement). A party "should not be burdened with having to comply with a subpoena if . . . the agency issuing it has no jurisdiction to regulate the [subject of the subpoena]." *Reich v. Great Lakes Indian Fish & Wildlife Comm'n*, 4 F.3d 490, 492 (7th Cir. 1993). Courts therefore properly consider questions of law about the scope of an

[1] At the time of the hearing of these motions, the Movants will explain to the Court the significance and problematic nature of the location of the proposed "investigative hearings".

agency's authority at the subpoena-enforcement stage. *Id.* ("Questions of regulatory jurisdiction are properly addressed at the subpoena-enforcement stage if, as here, they are ripe for determination at that stage."); *see also Machinists Non-Partisan Political League*, 655 F.2d at 390 ("[I]t is essential for a court to assure itself affirmatively that the investigation is within the subject matter jurisdiction of the [agency] before lending its authority to enforcement of a subpoena.").

The CFPB is a relatively new agency, created in 2011—and its aggressive attempts to assert which it perceives as its authority have prompted rigorous review by the federal courts when considering the CFPB's petitions to enforce its CIDs. For example, in *Consumer Fin. Prot. Bureau v. Accrediting Council for Indep. Colleges & Sch.*, 183 F. Supp. 3d 79, 82 (D.D.C. 2016), *aff'd*, 854 F.3d 683 (D.C. Cir. 2017), the district court rejected a CFPB petition to enforce a CID purporting to investigate "unlawful acts and practices in connection with accrediting for-profit colleges." The court concluded that the CID was beyond the agency's jurisdiction, warning the CFPB to be "prudent before choosing to plow head long into fields not clearly ceded to them by Congress," 183 F. Supp. 3d at 84, and emphasizing that courts cannot defer to an agency's assertion of authority when that authority is evidently lacking.

ARGUMENT

I. THE BUREAU, AS STRUCTURED, IS AN UNCONSTITUTIONAL ENTITY WHICH, AS A RESULT, IS PROHIBITED FROM EXERCISING THE ENFORCEMENT POWERS IT CLAIMS–INCLUDING, BUT NOT LIMITED TO, THE POWER TO COMPEL KERN-FULLER AND SUTTER TO APPEAR AND GIVE TESTIMONY.

The Bureau's structure itself violates basic principles of the separation of power in our federal government. By statute, the Director of the CFPB is unconstitutionally imbued with sweeping discretion both to promulgate and execute federal law, without accountability to the

electorate. Because the delegation of such authority patently contravenes the constitutional structure of our government, the Court should refuse to permit the Bureau to exercise executive power as it seeks to do in this matter.

The centrality of the separation of powers to the Constitution's fundamental purpose of securing and protecting individual liberty is axiomatic. "The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, legislative, executive and judicial, to assure, as nearly as possible, that each Branch of government would confine itself to its assigned responsibility." *INS v. Chadha*, 462 U.S. 919, 951 (1983). "The declared purpose of separating and dividing the powers of government, of course, was to 'diffus[e] power the better to secure liberty.'" *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (alteration in original) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)) In other words, "the dynamic between and among the branches is not the only object of the Constitution's concern. The structural principles secured by the separation of powers protect the individual as well." *Stern v. Marshall*, 564 U.S. 462, 483 (2011) (quoting *Bond v. United States*, 564 U.S. 211, 222 (2011)); *see also Bowsher*, 478 U.S. at 722 ("Even a cursory examination of the Constitution reveals the influence of Montesquieu's thesis that checks and balances were the foundation of a structure of government that would protect liberty."); *PHH Corp. v. CFPB*, 881 F.3d 75, 164 (D.C. Cir. 2018) (*en banc*) (Kavanaugh, J., dissenting) ("To prevent tyranny and protect individual liberty, the framers of the Constitution separated the legislative, executive, and judicial powers of the new national government.").

Article II provides that "[t]he executive Power shall be vested in a President of the United States of America." U.S. Const. Art. II, §1, Cl. 1. It "confers on the president 'the general administrative control of those executing the laws.'" *Free Enter. Fund v. PCAOB*, 561 U.S. 477,

492 (2010) (quoting *Myers v. United States*, 272 U.S. 52, 164 (1926)). "It is *his* responsibility to take care that the laws be faithfully executed. The buck stops with the President, in Harry Truman's phrase." *Id.* at 493 (emphasis in original). By granting the president these powers and making him accountable to the electorate, the Constitution protects individual liberty: as the Supreme Court explained, "unlike [in] parliamentary systems, the President, under Article II, is responsible not to the Congress but to the people." *Bowsher*, 478 U.S. at 722 (citing U.S. Const. art. II, §4). The Framers thus "created a structure in which '[a] dependence on the people' would be the 'primary control on the government.'" *Free Enter. Fund*, 561 U.S. at 501 (alteration in original) (quoting THE FEDERALIST NO. 51, at 349 (James Madison)); *see also PHH Corp.*, 881 F.3d at 164 (Kavanaugh, J., dissenting) ("To further safeguard liberty, the Framers insisted on accountability for the exercise of executive power. The Framers lodged full responsibility for the executive power in a President of the United States, who is elected by and accountable to the people.").

Thus, our federal system is based on "government by consent of the governed . . . . But consent of the governed is a sham if an administrative agency, by design, does not meaningfully answer for its policies to either of the elected branches. Such is the case with the Consumer Financial Protection Bureau." *PHH Corp.*, 881 F.3d at 137 (Henderson, J., dissenting).

A district court in the Southern District of New York considered the constitutionality of the Bureau's structure in *Consumer Fin. Prot. Bureau v. RD Legal Funding*, LLC, 332 F. Supp. 3d 729, 784 (S.D.N.Y. 2018), *appeal filed*, No. 18-3156 (2d Cir. Oct. 23, 2018). The court there adopted the persuasive reasoning of then-Judge Kavanaugh and Judge Henderson's dissenting opinion in *PHH Corp.* to hold that the Bureau is "unconstitutionally structured because it is an independent agency that exercises substantial executive power and is headed by a single Director." *RD Legal Funding*, LLC, 332 F. Supp. 3d at 784 (quoting *PHH Corp.*, 881 F.3d at 198.)

The Department of Justice has also recently acknowledged before the United States Supreme Court that it believes the CFPB Bureau to be unconstitutionally structured. *See* Brief, *State Nat'l Bank of Big Spring v. Mnuchin*, No. 18-307 (U.S. Dec. 10, 2018), *cert. denied*, 139 S. Ct. 916, (2019) (*See* **Exhibit "E"**). ("As noted, it is for such reasons that the Framers adopted a strong, unitary Executive—headed by the President—rather than a weak, divided one. Vesting such power in a single person not answerable to the President represents a stark departure from the Constitution's framework.").

"Start[ing], stop[ping], or alter[ing] individual . . . investigations" are "executive activities typically carried out by officials within the Executive Branch." *Free Enter. Fund*, 561 U.S. at 505. Yet as enacted, the CFPA does not allow the President to supervise, direct, or remove the Director at will. 12 U.S.C. § 5491(c). Rather, Congress insulated the Director from Presidential influence even if the President desires removal because of political disagreement. To further insulate the Director from any meaningful executive oversight, each Director is installed for a term of five years and can continue to act in office "until a successor has been appointed and qualified." *Id*. at § 5491(c)(2). Consequently, a Director may continue to serve through consecutive presidential terms despite strong intra-branch disagreement. This extraordinarily broad authority allows the CFPB's Director to implement and enforce United States consumer protection laws without any superior check of power within the Executive Branch. Instead of granting the entirety of the executive power in the President as required by Article II, Congress granted a large portion[2] of this power to the Director in enacting CFPA. Because the Director acts alone and without presidential

[2] The Bureau has exclusive jurisdiction to execute nineteen "federal consumer financial laws." *See* 12 U.S.C. §§ 5481(12), (14), 5511. Such laws include those previously executed by the Federal Reserve, the Comptroller of the Currency, the Office of Thrift Supervision, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Department of Housing and Urban Development, and the Federal Trade Commission. *See* 12 U.S.C. § 5581(b).

supervision or direction, the Bureau brandishes extensive authority over the United States economy. This results in the Director having more unchecked, unilateral power than any single member of another independent agency.

While the lack of executive control over the execution of such consequential swaths of federal law should itself be sufficient to hold that the structure of the CFPB violates the protections for individual liberty required by the Constitution, the CFPB also lacks any meaningful oversight by the legislative branch.

Ordinarily, administrative agencies are beholden to Congress–and by extension the people–by virtue of Congress' "power of the purse," *i.e.*, the power to approve or disapprove an agency's funding. However, the CFPB's statutory structure vitiates even this form of accountability. The CFPB does not rely on congressional approval for the vast majority of its funding. Instead, the Director is permitted to unilaterally demand up to twelve percent of the Federal Reserve's annual expenses–well over half a billion dollars each year–without congressional review short of restructuring the Bureau. The Federal Reserve has no power to deny the CFPB's funding: "Each year . . . the Board of Governors shall transfer to the Bureau . . . the amount determined by the Director to be reasonably necessary to carry out the authorities of the Bureau." 12 U.S.C. § 5497(a)(1).

Under this statutory scheme, the CFPB is almost completely insulated from all meaningful control by either the executive or legislative branches of the federal government. It is therefore the responsibility of the judiciary to declare such delegation of power unconstitutional. *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("[A]n act of the legislature, repugnant to the constitution, is void.")

Ultimately, the structure established by Congress through the enactment of CFPA is a violation of the separation of powers principle, and it threatens individual liberty. As such, the Bureau itself should be prohibited from exercising executive power in its current form, and the instant CIDs should therefore be quashed or otherwise set aside.

II. THE GOVERNMENT HAS INSTITUTED PROCEEDINGS AFTER ITS INVESTIGATION INTO THIS MATTER: THE BUREAU THEREFORE LACKS THE AUTHORITY TO ISSUE FURTHER CIVIL INVESTIGATIVE DEMANDS.

Because the Government has already instituted proceedings in this matter, the CFPB's attempt to proceed with its investigation through the vehicle of a CID is expressly prohibited by statute.

In this case, the CFPB has already conducted investigational hearings via CIDs with:

- Karen Everett in Jonesboro, Arkansas
- Michelle Plant in Little Rock, Arkansas on November 28, 2018;
- Michael Chrustawka in Dallas, Texas on January 9, 2019;
- Katharine Snyder in Dallas, Texas on January 10, 2019; and
- Amy Plummer in Columbia, South Carolina on June 18, 2019.

Additionally, the CFPB has also interviewed Kristin Harris and Ferrari Scroggs, former employees of VFG and BAIC. Then, the CFPB entered both a Stipulation and issued a Consent Order against Mark Corbett in File No. 2019-BCFP-0002 regarding these very transactions on January 23, 2019, which Corbett executed on January 14, 2019. (*See* **attached Exhibit "F"**). In Part IV of that Consent Order, Corbett and the CFPB agreed that:

4. Respondent is a "covered person" as that term is defined by 12 U.S.C. § 5481(5)-(7), (15)(A)(i).

5. Respondent, serving as an agent of companies Doe 1, 2, 3, and 4 (Doe Companies), brokers contracts offering high-interest credit to veterans. The credit offers are marketed as purchases of veterans' future pension or disability payments.

6. Respondent, working as a broker for the Doe Companies, sets up contracts between veterans and investors where veterans receive a lump-sum payment, ranging from a few thousand to tens of thousands of dollars, and are thereafter obligated to repay a much larger amount by assigning to investors all or part of their monthly pension or disability payments. The veterans' obligations typically last five to ten years.

7. The high-interest credit offers Respondent brokers are for veterans who have Department of Veterans Affairs (VA) disability pensions or pensions administered by the Defense Finance and Accounting Service (DFAS). The VA establishes a veteran's level of disability compensation and administers disability pensions. DFAS is a federal agency within the Department of Defense; it includes an office that issues monthly pension payments to military retirees.

8. From at least 2011 through 2018, the Doe Companies' contracts required veterans to go into their VA or DFAS online portal and change their entire pension direct-deposits or their monthly allotments to be routed directly into a bank account controlled by the Doe Companies or their agents. If veterans contracted to sell only part of their pensions through the Doe Companies, the Doe Companies would receive the veterans' entire pension direct-deposits or monthly allotments and then remit portions of them to the veterans' bank accounts.

9. Veterans can repay the contracts from sources other than the contracted-for income stream, such as a life insurance policy. In fact, veterans were required to purchase life insurance policies so that, should a veteran die and the income stream stop, the outstanding amount on the contract would still be paid.

10. Federal law prohibits agreements under which another person acquires the right to receive a veteran's pension payments. 38 U.S.C. § 5301(a)(3)(C).

11. Respondent operates websites that exist solely to direct consumers to the Doe Companies. When veterans search the internet for loans to veterans or for pension sales, they may encounter one of Respondent's websites. Respondent's marketing efforts appear to have been responsible for bringing in about 80% of the Doe Companies' consumer-side business.

12. Completion of an online form on one of Respondent's websites sends a veteran's contact information to Respondent. Respondent then contacts the veteran. Veterans describe to Respondent how much money they want to borrow and how much of their monthly pension allotment they want to pay each month. Respondent determines whether a veteran is a good candidate for a purported pension sale and puts the veteran in contact with one of the Doe Companies.

13. Respondent determines with the Doe Companies the terms of the credit to be offered to the veterans, including the amount of the lump sum the veterans will receive.

14. Respondent is paid a commission by one of the Doe Companies based on the final profit the company expects to make from each purported pension sale. The

company makes its profit on the front-end by having the investor pay a lump sum that is larger than the lump sum that is paid to the veteran.

15. Respondent represents to veterans that the Doe Companies' products are sales and not high-interest credit offers. For example, the first page of the "New Seller Information Packet," sent to veterans by Respondent, or by the Doe Companies at Respondent's direction, states, "It is important to note that this is not a loan[.]" The first paragraph of a form email sent with the packet states, "Please keep in mind that this is not a loan, you are selling a product for a set price."

16. In his communications with veterans who had ostensibly been matched with a buyer, Respondent routinely told veterans that they would receive their funds by a specific date or within a specified period. On multiple occasions, however, the Doe Companies did not deliver the funds to the veterans by the promised date. Many veterans experienced funding delays, some as long as several months.

17. Respondent does not disclose to veterans the interest rates for the transactions he brokers. Respondent knows the credit offers have varied interest rates, depending on the length of the repayment period, but he does not inform veterans of these interest rates.

18. Many veterans realized the illegal nature of the transactions, and some complained directly to Respondent and the Doe Companies that the transactions are illegal. In response, Respondent repeatedly told veterans that the transactions were legal.

The CFPB's and Corbett's "admissions" in **Exhibit "F"** comprise a full eight (8) pages of the January 23, 2019 Consent Order and involve the *exact* transactions the CFPB contends they

wish to take oral testimony from Movants about for their further "investigation." However, there is no testimony required from Movants that would assist the CFPB in any "investigation." Rather, it is patently clear that the CFPB has already made its own conclusions about the transactions at issue and entered into proceedings to take enforcement actions related thereto.

Though exercising broad and effectively unchecked executive power, the CFPA does provide some limit the scope of the CFPB's power to investigate. *See* 12 U.S.C. § 5562. Specifically, the Bureau may not issue a civil investigative demand after "the institution of ***any*** proceedings under the Federal consumer financial law." § 5562(c)(1):

> Whenever the Bureau has reason to believe that any person may be in possession, custody, or control of any documentary material or tangible things, or may have any information, relevant to a violation, the Bureau may, ***before the institution of any proceedings under the Federal consumer financial law***, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to—
>
> **(A)** produce such documentary material for inspection and copying or reproduction in the form or medium requested by the Bureau;
> **(B)** submit such tangible things;
> **(C)** file written reports or answers to questions;
> **(D)** give oral testimony concerning documentary material, tangible things, or other information; or
> **(E)** furnish any combination of such material, answers, or testimony.

Id. (emphasis added)

In *United States v. Kernan Hosp.*, the district court in the District of Maryland quashed a CID issued by the Government based on the above-emphasized limitation. *See* No. CIV.A. RDB-11-2961, 2012 WL 5879133, at *4 (D. Md. Nov. 20, 2012) (Attached as **Exhibit "G"**). The court specifically held that the Government could not issue a CID regarding the same dispute if the Government had already filed an action, regardless of the status of that action or the sufficiency of the Government's pleading. *Id.* at *4, *7. In that case, a hospital was accused of violating the False Claims Act. The Government brought suit after an investigation, but the complaint was dismissed

for failure to plead fraud with particularity. *Id.* at *1. The Government then sought to further its investigation–to enable it to cure its defective pleading–by issuing a CID.[3] After conducting a thorough review of the legislative history of the statute, the court rejected the Government's argument that it needed the CID as an investigative tool to cure its pleading, *id.* at *6, because the Government had already investigated wrongdoing and chose to file suit with what it had discovered up to that point. *Id.* The court set aside the CID, because it was issued after the Government filed its action, and was therefore without statutory authorization. *Id.*

The statutory circumscription on the Attorney General's authority to issue CIDs under 18 U.S.C. § 3733(a)(1) is essentially coterminous with the limitation on the CFPB's CID power under 12 U.S.C. 5562(c)(1). Under either provision, a CID must issue, if at all, before an action is commenced. Under *Kernan*, subsequent CIDs that relate to the same matter, whether or not the filed case is still pending, and whether or not the Government's pleading is adequate, are without statutory authority.

The CFPB's instant CIDs are therefore without authority, because after a robust investigation into precisely that which it seeks to further "investigate" now, *i.e.*, "whether persons that purport to acquire the rights to veterans' military pensions or other benefits in exchange for lump-sums are offering to extend credit or extending credit," the CFPB took enforcement action against Corbett.) Further, on September 13, 2018, the CFPB initiated an action in the Central District of California against Scott A. Kohn, seventeen business entities, and Does 1-100. *See generally* Complaint, *Consumer Fin. Prot. Bureau v. Future Income Payments, LLC*, No. 8:18-cv-1654, 2018 WL 4356702 (C.D. Cal. Sept. 13, 2018) ("Complaint") (**Exhibit "H"**). The Complaint, brought under the "federal consumer financial law," Complaint ¶ 7, alleged that the

[3] Under the False Claims Act ("FCA"), a CID is authorized "before commencing a civil proceeding" under the statute. 31 U.S.C. § 3733(a)(1).

defendants, both named and unnamed, "purport to acquire or purported to acquire income streams from consumers entitled to payments from pensions, annuities, legal settlements, or other similar sources" and that the aggregate of the defendants' activity constituted the extension of consumer credit. *Id.* ¶¶ 13-14. The allegations in the Complaint are nearly indistinguishable from the requested information that is the subject of the CIDs in this matter. Further, the Bureau is currently seeking to use CIDs to cure an otherwise defective pleading with regard to an indeterminate class of potential defendants, which is expressly prohibited by the sound interpretation and reasoning of *Kernan*. The CFPB's Complaint alleges as follows:

> The true names and capacities of the Defendants sued herein as Does 1 through 100, inclusive, are unknown to the Bureau. The Bureau therefore sues these Defendants by such fictitious names. When the true names and capacities of these Defendants have been ascertained, the Bureau will seek leave to amend this Complaint to insert the true names and capacities of the fictitiously-named Defendants. The Bureau believes, and therefore alleges, that these Defendants participated in, and in some part are responsible for, the illegal acts alleged herein. Each reference in this Complaint to Defendants is also a reference to all Defendants sued as Does.

Complaint ¶ 17. The plain meaning of 12 U.S.C. § 5562(c)(1) and the sound interpretation of a nearly identical statute in *Kernan* both dictate that however the Bureau seeks to "ascertain" the "true names and capacities" of unidentified defendants, it may not do so with CIDs. *Kernan* specifically rejected the argument that CIDs could be used to gather information to amend a deficient pleading, and renders irrelevant the status of the action previously filed.

Because the CFPB has already filed both an Administrative enforcement action and a now a suit arising out of its investigation into the same conduct that it has alleged is the subject of the CIDs, naming Does 1-100, the CFPB is precluded from issuing the CIDs under 12 U.S.C. § 5562(c)(1). Movants therefore respectfully requests that the court quash or otherwise set aside the CIDs for a lack of statutory authority.

III. <u>THE CFPA'S PRACTICE OF LAW EXCLUSION PROHIBITS THE BUREAU FROM COMPELLING MOVANTS TO APPEAR AND GIVE TESTIMONY.</u>

Under 12 U.S.C. § 5517(e)(1)'s practice of law exclusion, "The Bureau may not exercise any supervisory or enforcement authority with respect to an activity engaged in by an attorney as part of the practice of law under the laws of a State in which the attorney is licensed to practice law." However, 12 U.S.C. § 5517(e)(2)(A)-(B) sets forth two exceptions to the practice of law exclusion. First, this exclusion does not protect consumer financial products or services "that [are] not offered or provided as part of, or incidental to, the practice of law, occurring exclusively within the scope of the attorney-client relationship." 12 U.S.C. § 5517(e)(2)(A). Second, the exclusion also does not protect consumer financial products or services "that [are] otherwise offered or provided by the attorney in question with respect to any consumer who is not receiving legal advice or services from the attorney in connection with such financial product or service." 12 U.S.C. § 5517(e)(2)(B).

Movants are attorneys in good standing with the South Carolina bar and practice with and are partners in the Upstate Law Group, LLC. Although Movants did not represent any veteran sellers in the present matter, they did function as closing attorneys and escrow agents to review contracts for their clients. Neither Kern-Fuller nor Sutter explained documents or presented contracts for signature. Rather, by the time the contracts were received by Movants, the contracts were already executed by the veteran seller and each veteran seller had also instructed either the Department of Veterans Affairs ("VA") or the Defense Finance and Accounting Services ("DFAS") to deposit either the entire monthly benefit or an allotment in the amount of the contract into an Interest on Lawyer Trust Account ("IOLTA") maintained by Upstate Law Group.[4]

[4] Additionally, beginning in May of 2017, all new transaction (and a majority of the existing escrow cases) were drafted into Movants' IOLTA account from an account designated by the veteran seller *after* any monthly benefits at issue were credited to the veteran seller.

Thereafter, Upstate Law Group disbursed agreed-upon monthly payments to the buyer from the amounts credited to their IOLTA account. If the veteran seller deposited a monthly amount in excess of the contract amount, Movants refunded the difference to the account designated by the veteran seller. The lump-sum purchase price and the deductions thereto that were approved by the veteran seller were disbursed by Upstate Law Group. Thus, under the practice of law exclusion itself, the Bureau cannot exercise enforcement authority over Movants because they were acting pursuant to their law license. The only way that the Bureau has authority to issue CIDs to Movants in this matter is under the practice of law exclusion exceptions.

The first exception does not apply here because, as mentioned above, Movants were indeed providing services incidental to the scope of the attorney-client relationship. Ensuring contract adherence and disbursing funds incidental to the contract consummations were part of their role as closing attorneys and escrow agents. Movants had a responsibility and obligation to review sales contracts and ensure their proper execution before disbursing lump-sum payments to buyers and veteran sellers. The second exception also does not apply in the present matter because Movant's services were, in fact, provided in connection to fixed income streams. Because the practice of law exclusion does apply without exception herein, the CIDs issued to Movants by the Bureau are inconsistent with the applicable provisions of the CFPA – the very statute that monitors the Bureau's existence, without which the Bureau would not exist. This inconsistency demonstrates that the Bureau acted without authority in issuing CIDs to Movants, thus demanding their revocation.

CONCLUSION

For the reasons outlined below and to be discussed in more detail at a hearing should the Court grant our request for same, the Bureau's CIDs for the provision of oral testimony by the Movants at an "investigative hearing" should be quashed. Undersigned counsel notes that they informed counsel for the CFPB of their intentions to file the instant motion if the CFPB persisted in its efforts to proceed with these "investigative hearings" on August 8 and 9, 2019 and these issues could not be resolved. Counsel also asked counsel for the CFPB how it preferred to be served with the instant motion and has not as the date of this filing received an answer from the CFPB. Counsel does not intend to produce the Movants on August 8 and/or 9 unless otherwise directed by this Court.

Respectfully submitted,

s/ Deborah B. Barbier
Deborah B. Barbier Fed ID No. 6639
Deborah B. Barbier, LLC
1811 Pickens Street
Columbia, SC 29201
PHONE: 803.445.1032
FACSIMILE: 803.445.1036
dbb@deborahbarbier.com

Attorneys for Candy Kern-Fuller

s/ Mark C. Moore
Mark C. Moore Fed ID No. 4956
Nexsen Pruet, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, SC 29202
PHONE: 803.540.2146
FACSIMILE: 803.727.1458
MMoore@nexsenpruet.com

Attorneys for Howard E. Sutter, III

July 24, 2019
Columbia, South Carolina

EXHIBIT A

(Civil Investigative Demand ("CID") to Candy Kern-Fuller, Esquire)

S. C. Dept. of Consumer Affairs
2221 Devine Street, Suite 200
P.O. Box 5757
Columbia, SC 29250-5757

CERTIFIED MAIL™

7005 0390 0000 9561 7699

FEB 01 2019

BY

PERSONAL & CONFIDENTIAL
Candy Kern-Fuller, Esquire
200 E Main Street
Easley, SC 29640

South Carolina
Department of Consumer Affairs
SUBPOENA
Issued pursuant to S.C. Code Ann. §§ 37-6-106 and 37-6-118

In re: Violations of S.C. Consumer Protection Code Statutes, §§ 37-3-201, 37-3-305, 37-3-403, 37-3-501, 37-3-502, 37-5-108, and 37-6-202)))))

SUBPOENA TO APPEAR AND PROVIDE ORAL TESTIMONY

To: Candy M. Kern-Fuller, Esquire
Name
200 East Main Street
Address
Easley, SC 29640
City, State, Zip

From: Kelly H. Rainsford
Name
Deputy of Regulatory Enforcement
Title
803-734-4236
Telephone Number

You are commanded to appear and provide oral testimony on Thursday, February 28, 2019, at 10:00 A.M. at the following location:

S.C. Department of Consumer Affairs
2221 Devine Street, Suite 200
Columbia, SC 29205

The attachment contains instructions, definitions, and information regarding your right to seek relief. If you have any further questions, please contact the requesting party listed above. This subpoena is issued pursuant to S.C. Code Ann. §§ 37-6-106 and 37-6-118 based upon the Administrator's probable cause to believe that a person has engaged in an act in violation of the South Carolina Consumer Protection Act, S.C. Code Ann. § 37-1-101, *et seq*.

Date of issue: 1/29/2019

Carolyn Grube Lybarker
Carolyn Grube Lybarker, Administrator
South Carolina Department of Consumer Affairs
P.O. Box 5757
Columbia, SC 29250

THE STATE OF SOUTH CAROLINA
DEPARTMENT OF CONSUMER AFFAIRS

SUBPOENA ATTACHMENT

INSTRUCTIONS

A. **Confidentiality:** This subpoena relates to a nonpublic investigation being conducted by the Department. We ask that you not disclose the existence of this subpoena, except to legal counsel, until you have been notified that the investigation has been completed. Premature disclosure of this investigation could interfere with the Department's investigation.

B. **Document Retention:** Until you are notified otherwise, you are required to retain all documents and other tangible things that you used or relied on in preparation for providing oral testimony in response to this subpoena. In addition, you must retain, and suspend any procedures that may result in the destruction of, documents, information, or tangible things that are in any way relevant to the investigation. You are required to prevent the destruction of relevant material irrespective of whether you believe such material is protected from future disclosure or discovery by privilege or otherwise.

C. **Scope of Investigation:** This subpoena covers information in your possession, custody, or control, including but not limited to documents in the possession, custody, or control of your attorneys, accountants, representatives, other agents or consultants, directors, officers, and employees.

DEFINITIONS

A. The term "the Department" means the South Carolina Department of Consumer Affairs.

B. The term "Administrator" means the Administrator of the Department.

C. When used, the terms "you" and "your" shall refer to Candy M. Kern-Fuller.

D. The term "document" or "documents" consists of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electrical recording or other form of data compilation. The terms include any form of written, recorded or stored information, whether in the form of paper, audio tape, video tape, magnetic tape, magnetic disk, laser disk, computer, computer component, computer network, computer system, film, electronic mail or other medium of any sort.

E. "Person" means an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity.

F. The term "refer to" or "relating to" or "regarding" means in whole or in part relating to, referring to, regarding, constituting, containing, embodying, discussing, reflecting, dealing with, analyzing, pertaining to, or in any way relevant to the request.

THE STATE OF SOUTH CAROLINA
DEPARTMENT OF CONSUMER AFFAIRS

SUBPOENA ATTACHMENT

RIGHT TO SEEK RELIEF

South Carolina Code Ann. § 1-23-600 (G) provides:

> (G) Notwithstanding another provision of law, the Administrative Law Court has jurisdiction to review and enforce an administrative process issued by an agency or by a department of the executive branch of government, as defined in Section 1-30-10, such as a subpoena, administrative search warrant, cease and desist order, or other similar administrative order or process. A department or agency of the executive branch of government authorized by law to seek an administrative process may apply to the Administrative Law Court to issue or enforce an administrative process. A party aggrieved by an administrative process issued by a department or agency of the executive branch of government may apply to the Administrative Law Court for relief from the process as provided in the Rules of the Administrative Law Court.

The Administrative Law Court is located in:
Edgar A. Brown Building
1205 Pendleton St., Suite 224
Columbia, SC 29201

You may seek further information by contacting the Administrative Law Court at the address above, by telephone at (803)734-0550, or through their website at http://www.scalc.net.

EXHIBIT B

(Civil Investigative Demand ("CID") to Howard E. Sutter, III, Esquire)

S.C. Dept. of Consumer Affairs
2221 Devine Street, Suite 200
PO Box 5757
Columbia, SC 29250-5757

CERTIFIED MAIL™

7006 0100 0001 4645 3014

RECEIVED
FEB 07 2019

BY.

PERSONAL & CONFIDENTIAL
Howard E. Sutter, III, Esquire
200 E Main Street
Easley, SC 29640

South Carolina
Department of Consumer Affairs

SUBPOENA

Issued pursuant to S.C. Code Ann. §§ 37-6-106 and 37-6-118

In re: Violations of S.C. Consumer Protection Code Statutes, §§ 37-3-201, 37-3-305, 37-3-403, 37-3-501, 37-3-502, 37-5-108, and 37-6-202

SUBPOENA TO APPEAR AND PROVIDE ORAL TESTIMONY

To: Howard E. Sutter, III, Esquire
Name
200 East Main Street
Address
Easley, SC 29640
City, State, Zip

From: Kelly H. Rainsford
Name
Deputy of Regulatory Enforcement
Title
803-734-4236
Telephone Number

You are commanded to appear and provide oral testimony on Wednesday, February 27, 2019, at 1:00 P.M. at the following location:

S.C. Department of Consumer Affairs
2221 Devine Street, Suite 200
Columbia, SC 29205

The attachment contains instructions, definitions, and information regarding your right to seek relief. If you have any further questions, please contact the requesting party listed above. This subpoena is issued pursuant to S.C. Code Ann. §§ 37-6-106 and 37-6-118 based upon the Administrator's probable cause to believe that a person has engaged in an act in violation of the South Carolina Consumer Protection Act, S.C. Code Ann. § 37-1-101, *et seq.*

Date of issue: 1/29/2019

Carolyn Grube Lybarker

Carolyn Grube Lybarker, Administrator
South Carolina Department of Consumer Affairs
P.O. Box 5757
Columbia, SC 29250

THE STATE OF SOUTH CAROLINA
DEPARTMENT OF CONSUMER AFFAIRS

SUBPOENA ATTACHMENT

INSTRUCTIONS

A. **Confidentiality:** This subpoena relates to a nonpublic investigation being conducted by the Department. We ask that you not disclose the existence of this subpoena, except to legal counsel, until you have been notified that the investigation has been completed. Premature disclosure of this investigation could interfere with the Department's investigation.

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C. **Scope of Investigation:** This subpoena covers information in your possession, custody, or control, including but not limited to documents in the possession, custody, or control of your attorneys, accountants, representatives, other agents or consultants, directors, officers, and employees.

DEFINITIONS

A. The term "the Department" means the South Carolina Department of Consumer Affairs.

B. The term "Administrator" means the Administrator of the Department.

C. When used, the terms "you" and "your" shall refer to Howard E. Sutter, III.

D. The term "document" or "documents" consists of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electrical recording or other form of data compilation. The terms include any form of written, recorded or stored information, whether in the form of paper, audio tape, video tape, magnetic tape, magnetic disk, laser disk, computer, computer component, computer network, computer system, film, electronic mail or other medium of any sort.

E. "Person" means an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity.

F. The term "refer to" or "relating to" or "regarding" means in whole or in part relating to, referring to, regarding, constituting, containing, embodying, discussing, reflecting, dealing with, analyzing, pertaining to, or in any way relevant to the request.

THE STATE OF SOUTH CAROLINA
DEPARTMENT OF CONSUMER AFFAIRS

SUBPOENA ATTACHMENT

RIGHT TO SEEK RELIEF

South Carolina Code Ann. § 1-23-600 (G) provides:

> (G) Notwithstanding another provision of law, the Administrative Law Court has jurisdiction to review and enforce an administrative process issued by an agency or by a department of the executive branch of government, as defined in Section 1-30-10, such as a subpoena, administrative search warrant, cease and desist order, or other similar administrative order or process. A department or agency of the executive branch of government authorized by law to seek an administrative process may apply to the Administrative Law Court to issue or enforce an administrative process. A party aggrieved by an administrative process issued by a department or agency of the executive branch of government may apply to the Administrative Law Court for relief from the process as provided in the Rules of the Administrative Law Court.

The Administrative Law Court is located in:
Edgar A. Brown Building
1205 Pendleton St., Suite 224
Columbia, SC 29201

You may seek further information by contacting the Administrative Law Court at the address above, by telephone at (803)734-0550, or through their website at http://www.scalc.net.

EXHIBIT C

(Notice of Investigative Hearing Seeking Movant Candy Kern-Fuller's Testimony)

1700 G Street, NW
Washington, DC 20552

July 9, 2019

Via Certified Mail

Deborah B. Barbier
Deborah B. Barbier, LLC
1811 Pickens Street
Columbia, SC 29201

Re: Candy Kern-Fuller

Dear Ms. Barbier:

Pursuant to Director Kraninger's Order of April 25, 2019 (attached) the Bureau intends to conduct an investigational hearing of your client, Ms. Candy Kern-Fuller, on August 9, 2019 at 10AM at the U.S. Attorneys Office located at 1441 Main Street, Suite 500, Columbia, SC 29201.

Please confirm Ms. Kern-Fuller's attendance at your earliest convenience.

Sincerely,

Benjamin Konop
Senior Litigation Counsel

Bureau of Consumer Financial Protection
1700 G Street NW
Washington, D.C. 20552

IN RE KERN-FULLER AND SUTTER,	)
2019-MISC-Candy Kern-Fuller and Howard E. Sutter III-0001	)

DECISION AND ORDER ON PETITION BY CANDY KERN-FULLER AND HOWARD E. SUTTER TO MODIFY OR SET ASIDE CIVIL INVESTIGATIVE DEMAND

Candy Kern-Fuller and Howard E. Sutter have petitioned the Consumer Financial Protection Bureau for an order to modify or set aside two civil investigative demands (CIDs) the Bureau issued to them. For the reasons set forth below, the Petition is granted in part and denied in part.

FACTUAL BACKGROUND

On February 12, 2019, the Bureau issued CIDs to Candy Kern-Fuller and Howard E. Sutter seeking oral testimony. Both Kern-Fuller and Sutter work as attorneys at Upstate Law Group, LLC. As explained in the CIDs' notifications of purpose:

> The purpose of this investigation is to determine whether persons that purport to acquire the rights to veterans' military pensions or other benefits in exchange for lump-sums are offering to extend credit or extending credit. The purpose of this investigation is also to determine whether, in connection with offering or collecting on these products, such persons have engaged in unfair, deceptive, or abusive acts or practices in violation of §§ 1031 and 1036 of the Consumer Financial Protection Act of 2010, 12 U.S.C. §§ 5531, 5536.

The CIDs further advise that the investigation also seeks "to determine whether Bureau action to obtain legal or equitable relief would be in the public interest." The CIDs required Sutter to provide oral testimony on February 28, 2019, and Kern-Fuller to do so on March 1. The CIDs stated that the Deputy Assistant Director of the Bureau's Office of Enforcement had waived the meet-and-confer requirement in 12 C.F.R. § 1080.6(c), as authorized by that provision.

Petitioners timely filed their Petition to Modify or Set Aside the CIDs on February 15.

LEGAL DETERMINATION

Petitioners argue that the CIDs should be modified or set aside for three reasons. None warrant setting aside or modifying the CIDs. I will exercise my discretion, however, to modify the CIDs' notifications of purpose.

First, Petitioners contend that I should grant the Petition to set aside the CIDs because the Bureau's statutory structure is unconstitutional. It is doubtful that I have the authority to declare the Bureau's organic statute unconstitutional in this administrative proceeding. *See, e.g., United Space Alliance, LLC v. Solis*, 824 F. Supp. 2d 68, 97 n.10 (D.D.C. 2011) ("[G]overnment agencies may not entertain a constitutional challenge to authorizing statutes[.]" (quoting *Lepre v. Dep't of Labor*, 275 F.3d 59, 75 (D.C. Cir. 2001) (Silberman, J. concurring))); *Buckeye Indus., Inc. v. Sec'y of Labor, Occupational Safety & Health Review Comm'n*, 587 F.2d 231, 235 (5th Cir. 1979) ("[n]o administrative tribunal of the United States has the authority to declare unconstitutional the Act which it is called upon to administer"); *Robinson v. United States*, 718 F.2d 336, 338 (10th Cir. 1983) (same). In any event, the Bureau has consistently maintained that its statutory structure is constitutional under controlling Supreme Court precedent. All but two of the courts to consider the question have agreed. *See, e.g., PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018) (en banc). I therefore reject Petitioners' claim that the CIDs should be set aside on constitutional grounds.

Second, Petitioners argue that the CIDs should be modified or set aside because their notifications of purpose do not "state the nature of the conduct constituting the alleged violation which is under investigation," as required of all Bureau CIDs by 12 U.S.C. § 5562(c)(2).

On April 23, 2019, the Bureau issued a statement advising the public that the Office of Enforcement has changed its practices so that notifications of purpose contained in its CIDs provide the recipients of CIDs with even more information regarding the focus of Bureau investigations. Consistent with this approach, and in order to provide Petitioners with a better understanding of the nature of the Bureau's investigation, I am exercising the discretion afforded by section 1052(f)(1) of the CFPA and 12 C.F.R. § 1080.6(e)(4) to modify the notification of purpose contained in both CIDs as follows:

> The purpose of this investigation is to determine whether persons that purport to acquire the rights to veterans' military pensions or other benefits in exchange for lump-sums are offering to extend credit or extending credit. The purpose of this investigation is also to determine whether such persons, in connection with offering or collecting on these products, have made false or misleading representations to consumers or have failed to disclose to consumers the applicable interest rate on the credit offer, in a manner that is unfair, deceptive, or abusive in violation of Sections 1031 and 1036 of the Consumer Financial Protection Act of 2010, 12 U.S.C. §§ 5531, 5536. The purpose of this investigation is also to determine whether Bureau action to obtain legal or equitable relief would be in the public interest.

Petitioners' arguments based on the original, unmodified notification of purpose do not provide a basis for setting aside or further modifying the CIDs, as the modified statement of purpose clearly satisfies the statutory standard. *See, e.g.*, *CFPB v. Heartland Campus Sols., ECSI*, 747 F. App'x 44, 48 n.3 (3d Cir. 2018) ("Congress required [the Bureau] to identify only the type of conduct that may violate the law and the law being violated.").

Third, Petitioners contend that because they are attorneys, the CIDs should be modified to protect attorney-client privileged information and attorney work product. Petitioners do not specify how the CIDs should be modified, nor do they identify any specific attorney-client communication or item of work product that they believe is protected. Regardless, it is unnecessary to modify the CIDs on this ground because the Bureau does not intend to seek properly privileged information and because the CFPA and the Bureau's rules already provide an orderly procedure for asserting privilege during the giving of oral testimony in response to a CID. *Cf.* 12 C.F.R. § 1080.8(b) (person withholding material based on assertion of privilege should follow specific procedures set out in rule rather than raising privilege objections in petition to set aside the CID).

By statute and rule, witnesses providing oral testimony in response to a CID are entitled to be accompanied, represented, and advised by counsel. 12 U.S.C. § 5562(c)(13)(D)(i); 12 C.F.R. § 1080.9(b). During such testimony, counsel or the witness "may object on the record to any question, in whole or in part, and such person shall briefly state for the record the reason for the objection." 12 U.S.C. § 5562(c)(13)(D)(iii); *accord* 12 C.F.R. § 1080.9(b)(1)-(2). Objections may properly be made "when it is claimed that [the witness] is entitled to refuse to answer the question on grounds of any constitutional or other legal right or privilege." 12 U.S.C. § 5562(c)(13)(D)(iii); accord 12 C.F.R. § 1080.9(b)(2). The Bureau may as appropriate take steps to challenge assertions of privilege by petitioning a federal district court for an order to enforce the CID and compel testimony. 12 U.S.C. § 5562(c)(13)(D)(iv)(I); 12 C.F.R. §§ 1080.10. This procedure ensures that witnesses have a chance to raise appropriate privilege objections while also memorializing the specific bases for the asserted protections with respect to each item of evidence sought. *See generally Clarke v. American Commerce Nat. Bank*, 974 F. 2d 127, 129 (9th Cir. 1992) ("[B]lanket assertions of the privilege are extremely disfavored. The privilege must ordinarily be raised as to each record sought to allow the court to rule with specificity." (internal citation and quotations marks omitted)); *United States v. Hodgson*, 492 F.2d 1175, 1177 (10th Cir. 1974) (rejecting blanket claim of privilege asserted in response to agency subpoena; "[a witness] must normally raise the privilege as to each record sought and each question asked so that at the enforcement hearing the court can rule with specificity").

Although Petitioners are entitled to raise appropriate privilege objections while testifying, in conformance with the procedure provided for by the CFPA and the Bureau's rules, their premature assertion of privilege provides no grounds for modifying or setting aside the CIDs themselves.

CONCLUSION

For the foregoing reasons, I grant the Petition in part and deny it in part. In particular, the CIDs' notifications of purpose are modified as set forth above. Kern-Fuller and Sutter are

directed to provide oral testimony at a time and location to be specified by Enforcement staff, or at another mutually agreeable time and location arranged with Enforcement staff.

April 25, 2019

Kathleen L. Kraninger, Director

EXHIBIT D

(Notice of Investigative Hearing Seeking Movant Howard E. Sutter, III's Testimony)

1700 G Street, NW
Washington, DC 20552

RECEIVED
JUL 15 2019
NEXSEN PRUET, LLC

BUREAU OF CONSUMER FINANCIAL PROTECTION · UNITED STATES OF AMERICA

July 9, 2019

Via Certified Mail

Mark C. Moore
Member
Nexsen Pruet, LLC
1230 Main Street, Suite 700
Columbia, SC 29201

Re: Howard Sutter

Dear Mr. Moore:

Pursuant to Director Kraninger's Order of April 25, 2019 (attached) the Bureau intends to conduct an investigational hearing of your client, Mr. Howard Sutter, on August 8, 2019 at 10AM at the U.S. Attorneys Office located at 1441 Main Street, Suite 500, Columbia, SC 29201.

Please confirm Mr. Sutter's attendance at your earliest convenience.

Sincerely,

Benjamin Konop
Senior Litigation Counsel

Bureau of Consumer Financial Protection
1700 G Street NW
Washington, D.C. 20552

IN RE KERN-FULLER AND SUTTER,

2019-MISC-Candy Kern-Fuller and Howard E. Sutter III-0001

DECISION AND ORDER ON PETITION BY CANDY KERN-FULLER AND HOWARD E. SUTTER TO MODIFY OR SET ASIDE CIVIL INVESTIGATIVE DEMAND

Candy Kern-Fuller and Howard E. Sutter have petitioned the Consumer Financial Protection Bureau for an order to modify or set aside two civil investigative demands (CIDs) the Bureau issued to them. For the reasons set forth below, the Petition is granted in part and denied in part.

FACTUAL BACKGROUND

On February 12, 2019, the Bureau issued CIDs to Candy Kern-Fuller and Howard E. Sutter seeking oral testimony. Both Kern-Fuller and Sutter work as attorneys at Upstate Law Group, LLC. As explained in the CIDs' notifications of purpose:

> The purpose of this investigation is to determine whether persons that purport to acquire the rights to veterans' military pensions or other benefits in exchange for lump-sums are offering to extend credit or extending credit. The purpose of this investigation is also to determine whether, in connection with offering or collecting on these products, such persons have engaged in unfair, deceptive, or abusive acts or practices in violation of §§ 1031 and 1036 of the Consumer Financial Protection Act of 2010, 12 U.S.C. §§ 5531, 5536.

The CIDs further advise that the investigation also seeks "to determine whether Bureau action to obtain legal or equitable relief would be in the public interest." The CIDs required Sutter to provide oral testimony on February 28, 2019, and Kern-Fuller to do so on March 1. The CIDs stated that the Deputy Assistant Director of the Bureau's Office of Enforcement had waived the meet-and-confer requirement in 12 C.F.R. § 1080.6(c), as authorized by that provision.

Petitioners timely filed their Petition to Modify or Set Aside the CIDs on February 15.

LEGAL DETERMINATION

Petitioners argue that the CIDs should be modified or set aside for three reasons. None warrant setting aside or modifying the CIDs. I will exercise my discretion, however, to modify the CIDs' notifications of purpose.

First, Petitioners contend that I should grant the Petition to set aside the CIDs because the Bureau's statutory structure is unconstitutional. It is doubtful that I have the authority to declare the Bureau's organic statute unconstitutional in this administrative proceeding. *See, e.g.*, *United Space Alliance, LLC v. Solis*, 824 F. Supp. 2d 68, 97 n.10 (D.D.C. 2011) ("[G]overnment agencies may not entertain a constitutional challenge to authorizing statutes[.]" (quoting *Lepre v. Dep't of Labor*, 275 F.3d 59, 75 (D.C. Cir. 2001) (Silberman, J. concurring))); *Buckeye Indus., Inc. v. Sec'y of Labor, Occupational Safety & Health Review Comm'n*, 587 F.2d 231, 235 (5th Cir. 1979) ("[n]o administrative tribunal of the United States has the authority to declare unconstitutional the Act which it is called upon to administer"); *Robinson v. United States*, 718 F.2d 336, 338 (10th Cir. 1983) (same). In any event, the Bureau has consistently maintained that its statutory structure is constitutional under controlling Supreme Court precedent. All but two of the courts to consider the question have agreed. *See, e.g.*, *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018) (en banc). I therefore reject Petitioners' claim that the CIDs should be set aside on constitutional grounds.

Second, Petitioners argue that the CIDs should be modified or set aside because their notifications of purpose do not "state the nature of the conduct constituting the alleged violation which is under investigation," as required of all Bureau CIDs by 12 U.S.C. § 5562(c)(2).

On April 23, 2019, the Bureau issued a statement advising the public that the Office of Enforcement has changed its practices so that notifications of purpose contained in its CIDs provide the recipients of CIDs with even more information regarding the focus of Bureau investigations. Consistent with this approach, and in order to provide Petitioners with a better understanding of the nature of the Bureau's investigation, I am exercising the discretion afforded by section 1052(f)(1) of the CFPA and 12 C.F.R. § 1080.6(e)(4) to modify the notification of purpose contained in both CIDs as follows:

> The purpose of this investigation is to determine whether persons that purport to acquire the rights to veterans' military pensions or other benefits in exchange for lump-sums are offering to extend credit or extending credit. The purpose of this investigation is also to determine whether such persons, in connection with offering or collecting on these products, have made false or misleading representations to consumers or have failed to disclose to consumers the applicable interest rate on the credit offer, in a manner that is unfair, deceptive, or abusive in violation of Sections 1031 and 1036 of the Consumer Financial Protection Act of 2010, 12 U.S.C. §§ 5531, 5536. The purpose of this investigation is also to determine whether Bureau action to obtain legal or equitable relief would be in the public interest.

Petitioners' arguments based on the original, unmodified notification of purpose do not provide a basis for setting aside or further modifying the CIDs, as the modified statement of purpose clearly satisfies the statutory standard. *See, e.g., CFPB v. Heartland Campus Sols., ECSI*, 747 F. App'x 44, 48 n.3 (3d Cir. 2018) ("Congress required [the Bureau] to identify only the type of conduct that may violate the law and the law being violated.").

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By statute and rule, witnesses providing oral testimony in response to a CID are entitled to be accompanied, represented, and advised by counsel. 12 U.S.C. § 5562(c)(13)(D)(i); 12 C.F.R. § 1080.9(b). During such testimony, counsel or the witness "may object on the record to any question, in whole or in part, and such person shall briefly state for the record the reason for the objection." 12 U.S.C. § 5562(c)(13)(D)(iii); *accord* 12 C.F.R. § 1080.9(b)(1)-(2). Objections may properly be made "when it is claimed that [the witness] is entitled to refuse to answer the question on grounds of any constitutional or other legal right or privilege." 12 U.S.C. § 5562(c)(13)(D)(iii); accord 12 C.F.R. § 1080.9(b)(2). The Bureau may as appropriate take steps to challenge assertions of privilege by petitioning a federal district court for an order to enforce the CID and compel testimony. 12 U.S.C. § 5562(c)(13)(D)(iv)(I); 12 C.F.R. §§ 1080.10. This procedure ensures that witnesses have a chance to raise appropriate privilege objections while also memorializing the specific bases for the asserted protections with respect to each item of evidence sought. *See generally Clarke v. American Commerce Nat. Bank*, 974 F. 2d 127, 129 (9th Cir. 1992) ("[B]lanket assertions of the privilege are extremely disfavored. The privilege must ordinarily be raised as to each record sought to allow the court to rule with specificity." (internal citation and quotations marks omitted)); *United States v. Hodgson*, 492 F.2d 1175, 1177 (10th Cir. 1974) (rejecting blanket claim of privilege asserted in response to agency subpoena; "[a witness] must normally raise the privilege as to each record sought and each question asked so that at the enforcement hearing the court can rule with specificity").

Although Petitioners are entitled to raise appropriate privilege objections while testifying, in conformance with the procedure provided for by the CFPA and the Bureau's rules, their premature assertion of privilege provides no grounds for modifying or setting aside the CIDs themselves.

CONCLUSION

For the foregoing reasons, I grant the Petition in part and deny it in part. In particular, the CIDs' notifications of purpose are modified as set forth above. Kern-Fuller and Sutter are

directed to provide oral testimony at a time and location to be specified by Enforcement staff, or at another mutually agreeable time and location arranged with Enforcement staff.

April 25, 2019

Kathleen L. Kraninger
Kathleen L. Kraninger, Director

EXHIBIT E

(<u>Brief</u> re: State National Bank of Big Spring, et al. vs. Steven T. Mnuchin, Secretary of The Treasury, et al.)

No. 18-307

In the Supreme Court of the United States

STATE NATIONAL BANK OF BIG SPRING, ET AL., PETITIONERS

v.

STEVEN T. MNUCHIN, SECRETARY OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 12 U.S.C. 5491(c)(3) violates the separation of powers by prohibiting the President from removing the Director of the Bureau of Consumer Financial Protection except for "inefficiency, neglect of duty, or malfeasance in office."

2. Whether 12 U.S.C. 5497 violates the separation of powers by authorizing the Bureau of Consumer Financial Protection to receive up to a fixed amount of the Federal Reserve System's combined earnings, and authorizing Congress to appropriate any additional funds beyond that amount.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-2a) is not reported. The district court's order (Pet. App. 5a-22a) is reported at 197 F. Supp. 3d 177. An earlier decision of the court of appeals is reported at 795 F.3d 48. An earlier decision of the district court is reported at 958 F. Supp. 2d 127.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 2018. The petition for a writ of certiorari was filed on September 6, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In July 2010, the President signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. No. 111-203, 124 Stat.

1376. The legislation provided "a direct and comprehensive response to the financial crisis that nearly crippled the U.S. economy beginning in 2008." S. Rep. No. 176, 111th Cong., 2d Sess. 2 (2010). Its overarching purpose was to "promote the financial stability of the United States" through the establishment of measures designed to improve accountability, resiliency, and transparency in the financial system. *Ibid.* As most relevant here, the Act established the Bureau of Consumer Financial Protection (Bureau) to ensure "that all consumers have access to markets for consumer financial products and services and that markets for [such] products and services are fair, transparent, and competitive." 12 U.S.C. 5511(a).

a. The Dodd-Frank Act prohibits any "covered person"—generally an entity or person involved in "offering or providing a consumer financial product or service," 12 U.S.C. 5481(6)(A)—or any "service provider" from "engag[ing] in any unfair, deceptive, or abusive act or practice." 12 U.S.C. 5536(a)(1)(B). The Act then authorizes the Bureau to issue regulations identifying such acts or practices and to take enforcement actions against "covered person[s]" and "service provider[s]" to prevent them from engaging in such acts or practices. 12 U.S.C. 5531(a) and (b). The Act also transfers to the Bureau much of the authority to regulate consumer financial products and services that had been vested in other federal agencies, including the authority to prescribe regulations implementing the Truth in Lending Act, 15 U.S.C. 1601 *et seq.*; the Equal Credit Opportunity Act, 15 U.S.C. 1691 *et seq.*; the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. 2601 *et seq.*; and the Electronic Fund Transfer Act, 15 U.S.C. 1693

et seq. 12 U.S.C. 5481(12) and (14), 5581. The laws administered by the Bureau are referred to collectively as "[f]ederal consumer financial law." 12 U.S.C. 5481(14).

The Bureau has supervisory and enforcement authority to ensure that banks and credit unions with more than $10 billion in total assets comply with federal consumer financial law. 12 U.S.C. 5515. It has limited authority over smaller banks and credit unions that have $10 billion or less in total assets, over which other federal agencies retain primary authority to ensure compliance. 12 U.S.C. 5516. The Bureau, for example, has no authority to enforce the substantive requirements of federal consumer financial law with respect to such smaller institutions. See 12 U.S.C. 5516(d)(1), 5581(c)(2)(B). The Bureau may only require that those institutions submit reports, and the Bureau's examiners may participate in examinations of those institutions that are performed by other federal agencies to ensure compliance with federal consumer financial law. 12 U.S.C. 5516(b) and (c).

b. The Dodd-Frank Act established the Bureau as an "independent bureau" within the Federal Reserve System. 12 U.S.C. 5491(a). The Bureau is headed by a single Director, who is appointed by the President with the advice and consent of the Senate. 12 U.S.C. 5491(b)(1) and (2). The only qualification required for the Director is that he or she be a United States citizen. 12 U.S.C. 5491(b)(3). The Director serves for a term of five years, although he or she may continue serving as Director "until a successor has been appointed and qualified." 12 U.S.C. 5491(c)(1) and (2). The President may not remove the Director except for "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. 5491(c)(3).

The Bureau is funded in significant part by monetary transfers from the Federal Reserve System's combined earnings. Each year, the Director may request and the Federal Reserve must provide an amount the Director determines is "reasonably necessary to carry out" the Bureau's duties. 12 U.S.C. 5497(a)(1). That amount, however, may not exceed 12% of the Federal Reserve System's total operating expenses as reported in the Board of Governors' 2009 annual report, adjusted for inflation. 12 U.S.C. 5497(a)(2)(A)(iii) and (B).[1] If the Bureau requires more funds to carry out its duties, the Director must submit a report to the President and the Appropriations Committees of the Senate and House of Representatives, explaining the Bureau's funding, assets, and liabilities, and requesting appropriations. 12 U.S.C. 5497(e)(1). Congress authorized such appropriations, if needed, for fiscal years 2010-2014. 12 U.S.C. 5497(e)(2).

2. Petitioners are State National Bank of Big Spring (Bank); the 60 Plus Association, Inc., a non-profit, non-partisan seniors advocacy group; and the Competitive Enterprise Institute, a non-profit public interest organization. Pet. ii. Along with several States, petitioners sued the Department of the Treasury and its Secretary, the Bureau and its Director, the Federal Reserve System Board of Governors and its members, and numerous other federal defendants. Pet. App. 161a-243a. Petitioners alleged that the Director's protection from removal violates the Constitution's separation of powers, that Congress's vesting of authority in the Bureau violates the non-delegation doctrine, that the Director was

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[1] For fiscal years 2011 and 2012, the amount was capped 10% and 11%, respectively, of the same sum from the 2009 report. 12 U.S.C. 5497(a)(2)(A)(i) and (ii).

improperly appointed under the Recess Appointments Clause, and that other aspects of the Dodd-Frank Act, including provisions vesting authority in the Secretary of the Treasury and the Federal Deposit Insurance Corporation (FDIC), are unconstitutional. *Id.* at 221a-235a.[2]

a. The district court initially dismissed the complaint for lack of standing, concluding that petitioners had not suffered injury in fact from any actions of the Bureau or its Director. 958 F. Supp. 2d 127, 147-165. The court determined that the Bank's asserted compliance costs were "the costs of learning about the Bureau's regulatory and enforcement activities," rather than costs incurred to come into compliance with the Bureau's regulations or to respond to any reporting request. *Id.* at 151; see *id.* at 151-154. And although the Bureau had promulgated a rule imposing greater disclosure and compliance requirements on banks that offer remittance transfers (*i.e.*, electronic money transfers) to people and businesses outside the United States, *id.* at 148, the court observed that the Bank did not need to comply with the rule because of its limited number of remittances, *id.* at 154. The court noted that the Bank also relied on two of the Bureau's rules related to mortgages to establish its standing, but the court reasoned that "these two rules did not exist at the time the suit was filed, [and] they cannot form the basis of the Bank's standing." *Id.* at 156. Even if they could, more-

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[2] The plaintiff States joined only the challenges to the authority of the Secretary of the Treasury and the FDIC. See Pet. App. 228a-235a. They are not petitioners here.

over, the court determined that the Bank's alleged injuries from the rules were "far too speculative" to confer Article III standing. *Ibid.*[3]

The district court further determined that neither the Bank nor the States possessed standing to challenge the constitutionality of other aspects of the Dodd-Frank Act. See 958 F. Supp. 2d at 136-147. The court therefore dismissed petitioner's complaint in its entirety. *Id.* at 166.

b. The court of appeals affirmed in part and reversed in part. 795 F.3d 48 (Kavanaugh, J.).

Contrary to the district court, the court of appeals determined that the Bank had standing to challenge the constitutionality of the Bureau's structure. 795 F.3d at 53-54. The court of appeals observed that the Bank was generally subject to the Bureau's regulatory authority, and it specifically pointed to the Bureau's regulation of international remittances. *Id.* at 53. The court acknowledged that the Bank operated within a safe harbor from that regulation, but it noted that the Bank had "alleged that it must now monitor its remittances to stay within the safe harbor, and the monitoring program causes it to incur costs." *Ibid.* The court of appeals remanded the case to the district court to consider the merits of the Bank's challenge to the constitutionality of the Bureau's structure. *Id.* at 54.

The court of appeals also determined that the Bank had standing to challenge the recess appointment of the Bureau's Director for the same reasons, and remanded that claim for further consideration in light of this Court's decision in *NLRB* v. *Noel Canning*, 134 S. Ct.

[3] The other petitioners, the 60 Plus Association and the Competitive Enterprise Institute, did not advance any arguments for standing that were different from the Bank's. See 795 F.3d 48, 53 n.1.

2550 (2014). 795 F.3d at 54. But the court affirmed the district court's judgment that the plaintiffs lacked standing to raise their challenges to the Dodd-Frank Act unrelated to the Bureau. *Id.* at 54-57.[4]

c. On remand, the district court determined that petitioners' challenges to the Director's recess appointment failed on the merits because the Director, after he had been appointed by the President with the advice and consent of the Senate, had properly ratified his prior actions. Pet. App. 12a-22a. The court deferred ruling on petitioners' other constitutional challenges pending the decision by the en banc D.C. Circuit in *PHH Corp.* v. *Consumer Financial Protection Bureau*, 881 F.3d 75 (2018). Pet. App. 22a.

d. In *PHH*, a majority of the en banc court held that the statutory restriction on the President's authority to remove the Bureau's Director is constitutionally permissible. Pet. App. 244a-546a.

The court of appeals' majority observed that the removal restriction in 12 U.S.C. 5491(c)(3)—limiting the grounds for removal to inefficiency, neglect of duty, or malfeasance in office—is identical to the restriction upheld in *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), and less "onerous" than the restriction that this Court invalidated in *Free Enterprise Fund* v. *Public Co. Accounting Oversight Board*, 561 U.S. 477, 486 (2010). Pet. App. 287a. The majority determined that this removal restriction, which *Humphrey's Executor* approved as constitutional as applied to commis-

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[4] Petitioners do not seek review of the court of appeals' rulings on their lack of standing to challenge these other aspects of the Dodd-Frank Act. The Bureau is thus the only remaining respondent.

sioners of the multi-member Federal Trade Commission, is also constitutional as extended to the Bureau's single Director here. Pet. App. 294a-304a.

The court of appeals separately held that the Bureau's funding from the Federal Reserve System "has no constitutionally salient effect on the President's power." *Id.* at 293a; see *id.* at 291a-293a. The court noted that the challenger in *PHH* "suggest[ed]" that the Bureau's funding scheme may present constitutional concerns when considered in tandem with the Director's removal restriction. *Id.* at 293a. But the court concluded that the Bureau's "budgetary independence primarily affects Congress, which has the power of the purse; it does not intensify any effect on the President of the removal constraint," and therefore presents no constitutional problem whether considered alone or in tandem with that constraint. *Id.* at 294a.

Judge Tatel, joined by Judges Millett and Pillard, concurred and wrote separately to address non-constitutional issues presented by the case. Pet. App. 328a-335a. Judge Wilkins, joined by Judge Rogers, also concurred, stating that in his view the fact that the Director's underlying actions in *PHH* were taken in his adjudicatory role—rather than a rulemaking role—"seriously undermine[d] the separation-of-powers challenge before [the court]." *Id.* at 335a; *id.* at 335a-360a. Judge Griffith concurred in the judgment, reasoning that the restriction on removal of the Director should be read narrowly to permit the President to remove the Director "for ineffective policy choices," which in his view would afford the President sufficient control over the Executive Branch to address separation-of-powers concerns. *Id.* at 361a; see *id.* at 360a-391a.

Judge Kavanaugh, joined by Judge Randolph, dissented, reasoning that *Humphrey's Executor* could not be extended from removal restrictions on members of multi-member commissions to a removal restriction on the single director of the Bureau. Pet. App. 455a-541a. Judge Kavanaugh concluded that the removal restriction should be invalidated and severed from the rest of the Dodd-Frank Act. *Id.* at 535a-540a. Judge Henderson also dissented, concluding that the removal restriction is unconstitutional but cannot be severed from the rest of the Dodd-Frank Act's Title X (which created the Bureau). *Id.* at 391a-455a. Judge Randolph also dissented separately, stating that the proceedings in *PHH* presented a separate constitutional question concerning the appointment of the administrative law judge involved in that case, and suggesting that the en banc court should have waited until this Court decided *Lucia* v. *SEC*, 138 S. Ct. 2044 (2018), before rendering a decision. Pet. App. 541a-546a.

e. After the en banc court of appeals' decision in *PHH*, the parties here stipulated to a judgment by the district court against petitioners. Pet. App. 3a-4a. The court of appeals summarily affirmed, on the parties' joint request, finding that the "merits of the parties' positions are so clear as to warrant summary action." Pet. App. 2a (citing *PHH*, *supra*); see *id.* at 1a-2a.

ARGUMENT

Petitioner contends (Pet. 29-36) that the structure of the Bureau, including the for-cause removal restriction on its single director, violates the constitutional separation of powers. That question is important, and it warrants this Court's review in an appropriate case. This case, however, would be a poor vehicle for considering the constitutionality of the Bureau's structure because

it is unlikely that the question would be considered by the full Court in this case and, even if it were, there is a substantial jurisdictional question that could prevent the Court from reaching the merits of this dispute. Further review of this case is therefore unwarranted.

1. a. The principal question presented—whether the restriction on removal of the Director in 12 U.S.C. 5491(c)(3) violates the separation of powers—is an important one that warrants this Court's review in an appropriate case. As explained below, the United States has articulated its view that Section 5491(c)(3) impermissibly infringes on the President's control of the Executive Branch, and unconstitutionally frustrates the President's "responsibility to take care that the laws be faithfully executed." *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 493 (2010). Additionally, although the Bureau itself has continued to defend the constitutionality of its structure in the lower courts—where it possesses independent litigating authority, 12 U.S.C. 5564—it likewise agrees that, absent legislative action eliminating the restrictions on removal, the principal question presented in this case will ultimately need to be settled by this Court.

b. This case, however, would be a poor vehicle to consider the question for multiple reasons. First, if the Court were to grant a writ of certiorari in this case, it is unlikely that the case would be considered by the full Court. Justice Kavanaugh previously participated in this case while a judge on the D.C. Circuit, authoring the court of appeals' decision addressing petitioners' standing to challenge the constitutionality of the Bureau's structure. 795 F.3d 48. Particularly for a question of this magnitude, the Court may wish to wait for a vehicle in which all nine Justices are likely to participate.

Second, this case presents a substantial jurisdictional question that the Court would have to resolve (and resolve in petitioners' favor) before the Court could reach the merits. Two of the petitioners are not banks and are not regulated in any way by the Bureau. As for the Bank, because it holds less than $10 billion in assets, the Office of the Comptroller of the Currency—not the Bureau—has authority to supervise the Bank for compliance with federal consumer financial law and to enforce those laws against the Bank. See 12 U.S.C. 1813(q)(l), 5481, 5516; Pet. App. 173a (Bank has less than $275 million in deposits). And while the Bureau has authority to request a report from the Bank, 12 U.S.C. 5516(b), it has never done so, see 958 F. Supp. 2d at 148.

The Bureau has promulgated a rule governing international remittance transfers, which the Bank performs. But the Bureau's rule does not apply to banks that complete 100 or fewer remittances per year, 12 C.F.R. 1005.30(f)(2)(i), and the Bank's remittances have historically fallen well short of 100. C.A. App. 104. The Bank offered no evidence to support its bare assertion that it could or would complete more than 100 remittance transfers in a year but for the regulation. See *id.* at 104-105.

The court of appeals relied upon the Bank's assertion that it has incurred monitoring costs to ensure that it stays under the minimum remittances that trigger coverage under the Bureau's rule. 795 F.3d at 53. But self-inflicted costs incurred to address a highly speculative possibility of regulatory harm are insufficient to satisfy Article III. See *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 416 (2013) (holding that parties "cannot manufacture standing merely by inflicting harm on themselves

based on their fears of hypothetical future harm that is not certainly impending").

Finally, the Bank also invoked two of the Bureau's rules related to mortgages as demonstrating their standing to challenge the Bureau's structure. See 958 F. Supp. 2d at 148-149, 156. But as the district court recognized, neither of those rules had been issued when the plaintiffs filed their complaint, and neither rule was even mentioned in the operative second amended complaint. *Id.* at 156. Moreover, there is "substantial doubt" that those rules would ever apply to the Bank. *Id.* at 157. One rule regulates the origination of mortgage loans, and the Bank "chose to exit the mortgage lending business in 2010." *Ibid.* The other rule includes regulations on foreclosures of existing mortgages, but it, too, would not likely apply to the Bank because "the Bank ha[d] not initiated a single foreclosure from the beginning of 2008 through the end of 2012—a time during which foreclosures were rampant nationwide." *Ibid.* At a minimum, petitioners' standing is sufficiently questionable to present a significant vehicle problem.

c. There are other cases currently pending in the courts of appeals that raise similar challenges to the restriction on removal of the Director. See, *e.g.*, *CFPB* v. *RD Legal Funding, LLC*, No. 18-2743 (2d Cir. filed Sept. 17, 2018); *CFPB* v. *All American Cash Checking, Inc.*, No. 18-60302 (5th Cir. filed Apr. 24, 2018); *CFPB* v. *Seila Law, LLC*, No. 17-56324 (9th Cir. filed Sept 1, 2017). One or more of those cases may not present the same obstacles that could impede the full Court from considering the merits of this important issue.

2. On the merits, the United States agrees with petitioners that the statutory restriction on the President's authority to remove the Director violates the constitutional separation of powers.

a. Article II of the Constitution provides that "[t]he executive Power shall be vested" in the President, U.S. Const., Art. II, § 1, Cl. 1, and that he shall "take Care that the Laws be faithfully executed," *id.* § 3. "[I]f any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws." *Free Enter. Fund,* 561 U.S. at 492 (quoting 1 Annals of Cong. 463 (1789) (Joseph Gales ed., 1834) (remarks of Madison)). Just as the President's ability to "select[] * * * administrative officers is essential" to the exercise of "his executive power," *Myers* v. *United States*, 272 U.S. 52, 117 (1926); see U.S. Const. Art. II, § 2, Cl. 2, so too is his ability to "remov[e] those for whom he can not continue to be responsible," *Myers*, 272 U.S. at 117; see *Bowsher* v. *Synar*, 478 U.S. 714, 726 (1986) ("Once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey.") (citation omitted).

"Since 1789, the Constitution has been understood to empower the President to keep [executive] officers accountable—by removing them from office, if necessary." *Free Enter. Fund,* 561 U.S. at 483. Indeed, the First Congress extensively debated the President's removal authority when creating the Department of Foreign Affairs (which later became the Department of State). "The view that 'prevailed' * * * was that the executive power included a power to oversee executive officers through removal; because that traditional executive power was not 'expressly taken away, it remained

with the President.'" *Id.* at 492 (quoting Letter from James Madison to Thomas Jefferson (June 30, 1789), *reprinted in* 16 *Documentary History of the First Federal Congress of the United States of America* 893 (Charlene Bangs Bickford *et al.* eds., 2004)). This view "soon became the 'settled and well understood construction of the Constitution.'" *Ibid.* (quoting *Ex parte Hennen,* 38 U.S. (13 Pet.) 230, 259 (1839)).

This Court affirmed that established understanding in *Myers* and held that the President's executive power necessarily includes "the exclusive power of removal." 272 U.S. at 122. "[T]o hold otherwise," the Court explained, "would make it impossible for the President * * * to take care that the laws be faithfully executed." *Id.* at 164. And the Court has recently reaffirmed that the President's executive power "includes, as a general matter, the authority to remove those who assist him in carrying out his duties" to faithfully execute the laws. *Free Enter. Fund,* 561 U.S. at 513-514. "Without such power, the President could not be held fully accountable" for how executive power is exercised, and "[s]uch diffusion of authority 'would greatly diminish the intended and necessary responsibility of the chief magistrate himself.'" *Id.* at 514 (quoting *The Federalist No. 70,* at 478 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)).

b. The Court has recognized only one "limited" exception to the President's authority under Article II to remove principal officers of the United States. *Free Enter. Fund*, 561 U.S. at 495.

In *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), the Court recognized a narrow exception to the general rule in upholding a provision establishing that Federal Trade Commission (FTC) commissioners

could be removed only for "inefficiency, neglect of duty, or malfeasance in office." *Id.* at 620 (quoting 15 U.S.C. 41 (1934)). The Court's conclusion "depend[ed] upon the character of the office"—namely, that, in the Court's view at the time, the FTC commissioners were not "purely executive officers," *id.* at 631-632, because they "act[ed] in part quasi-legislatively and in part quasi-judicially," *id.* at 628.[5] In particular, the Court understood the FTC to act as a continuing deliberative body, composed of several members with staggered terms to maintain institutional expertise and promote a measure of stability that would not be immediately undermined by political vicissitudes. See *id.* at 624-625, 628. The FTC was "called upon to exercise the trained judgment of a body of experts" and was "so arranged that the membership would not be subject to complete change at any one time." *Id.* at 624. Indeed, the direct relationship perceived between those structural features and the restriction on the President's removal power was underscored by the fact that they all were enacted in the same statutory section. See 15 U.S.C. 41 (1934) (quoted in *Humphrey's Executor,* 295 U.S. at 620).

Humphrey's Executor has been understood to authorize similar removal restrictions as applied to other multi-member commissions with features and functions similar to those of the FTC. See, *e.g.*, *Wiener* v. *United States,* 357 U.S. 349, 355-356 (1958) (holding that "[t]he philosophy of *Humphrey's Executor*" precludes at-will removal of members of the War Claims Commission, a

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[5] Although this Court has since treated that distinction as not dispositive for at least some *inferior* officers, see *Morrison* v. *Olson,* 487 U.S. 654, 689 (1988), it has also reaffirmed the distinction as the sole basis for the *Humphrey's Executor* exception for *principal* officers, see *Free Enter. Fund*, 561 U.S. at 493.

three-member body that was charged with adjudicating war-related compensation claims); see also *Morrison* v. *Olson*, 487 U.S. 654, 724-725 (1988) (Scalia, J., dissenting) ("[R]emoval restrictions have been generally regarded as lawful for so-called 'independent regulatory agencies,' such as the Federal Trade Commission, the Interstate Commerce Commission, and the Consumer Product Safety Commission, which engage substantially in what has been called the 'quasi-legislative activity' of rulemaking.") (citations omitted).

As then-Judge Kavanaugh noted in his *PHH* dissent, "the multi-member structure of [such] independent agencies is not an accident." Pet. App. 506a. Rather, it has been generally recognized that a removal restriction is concomitant of—indeed, "*inextricably bound together*" with—a continuing deliberative body. *Ibid.* (quoting Robert E. Cushman, *The Independent Regulatory Commissions* 188 (1941)). As an extensive study of independent agencies conducted in 1977 by the Senate Committee on Governmental Affairs concluded, "[t]he size of the commission, the length of [its members'] terms, and the fact that they do not all lapse at one time are key elements of the independent structure." Senate Comm. on Governmental Affairs, *Study on Federal Regulation, Volume V, Regulatory Organization*, S. Doc. No. 91, 95th Cong., 2d Sess. 35 (1977); see *id.* at 79 (concluding that the "[c]hief" consideration in determining whether to create an independent commission, rather than an executive agency, "is the relative importance to be attached to group decisionmaking").

c. A single-headed agency lacks the critical structural attributes that were thought to justify "independent" status for multi-member regulatory commissions in *Humphrey's Executor*.

First, a multi-member commission with staggered-term memberships is established as a "quasi-legislative[]" or "quasi-judicial[]" "body of experts" that is supposed to operate in an interactive and deliberative manner, and is "so arranged that the membership would not be subject to complete change at any one time." *Humphrey's Executor,* 295 U.S. at 624, 628. Restricting the President's power to remove the members of such commissions has been thought to facilitate deliberative group decisionmaking and promote an inherent institutional continuity. An agency headed by a single officer, however, has none of those attributes.

To the contrary, a single-headed agency embodies a quintessentially executive structure. See *Clinton* v. *Jones,* 520 U.S. 681, 712 (1997) (Breyer, J., concurring in the judgment) (describing how the Founders "consciously decid[ed] to vest Executive authority in one person rather than several," in contrast with their vesting of legislative and judicial powers in multi-member bodies). It has long been recognized that "[d]ecision, activity, secre[c]y, and d[i]spatch will generally characterise the proceedings of one man in a much more eminent degree[] than the proceedings of a greater number." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1414, at 283 (1833). The Constitution specifies the official who must exercise that sort of executive power: the President, acting either personally or through subordinate officers who are accountable to him and whose actions he can control. See *Printz* v. *United States*, 521 U.S. 898, 922 (1997) ("The insistence of the Framers upon unity in the Federal Executive—to ensure both vigor and accountability—is well known.").

The attributes animating the exception in *Humphrey's Executor* thus are absent when Congress carves

off a portion of quintessentially executive power and vests it in a single principal officer not removable at the President's will. And because the *rationale* for the *Humphrey's Executor* exception does not apply, even the same level of intrusion into the President's exercise of executive authority approved in *Humphrey's Executive* cannot be justified when imposed by a single-headed agency like the Bureau. See *Humphrey's Executor*, 295 U.S. at 632 (disclaiming any conclusion on the permissibility of applying removal restriction to any office other than ones "such as that here involved").

Second, a single-headed independent agency presents a greater risk than a multi-member independent commission of taking actions or adopting policies inconsistent with the President's executive policy. Unlike a multi-headed commission, which generally must engage in at least some degree of deliberation and collaboration, a single Director can decisively implement his own views and exercise discretion without those structural constraints. As noted, it is for such reasons that the Framers adopted a strong, unitary Executive—headed by the President—rather than a weak, divided one. Vesting such power in a single person not answerable to the President represents a stark departure from the Constitution's framework.

That difference in decisionmaking is reinforced by the difference in the timing and composition of appointments to the two types of agencies. For a multi-headed commission with staggered terms, the President is generally assured to have an opportunity to appoint at least some of its members, and the bipartisan-membership requirement that is common for such commissions further increases the likelihood that at least some of the

holdover members share the President's views. By contrast, where a single Director has a term greater than four years, a President may never have the opportunity to appoint the Director. Cf. 12 U.S.C. 5491(c)(1) (Bureau's Director to serve a five-year term). An agency over which the President lacks control of both back-end removal and front-end appointment represents a further departure from the constitutional design.

To be sure, the frequency with which the threat of departures from the President's executive policy materializes will depend on the particular circumstances, but the "added" risk of such departures "makes a difference." *Free Enter. Fund*, 561 U.S. at 495. In *Morrison*, the interference with executive power was found to be mitigated because it applied only to an inferior officer with "limited jurisdiction and tenure" and the lack of any "policymaking or significant administrative authority." 487 U.S. at 691. In *Humphrey's Executor*, the interference with executive power was found to be mitigated by the FTC's multi-member nature. But the interference with executive power caused by the removal restriction on the Bureau's Director is exacerbated by both the Bureau's single-headed nature and its wide-ranging policymaking and enforcement authority over private conduct.

Third, unlike multi-member independent commissions, a single-headed independent agency like the Bureau is a relatively novel innovation. See Pet. App. 478a-484a (Kavanaugh, J., dissenting). In the separation-of-powers context, "the lack of historical precedent" for a new structure is "[p]erhaps the most telling indication of [a] severe constitutional problem." *Free Enter. Fund*, 561 U.S. at 505 (citation omitted); see *NLRB* v. *Noel Canning*, 134 S. Ct. 2550, 2559 (2014) ("'[L]ong

settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions' regulating the relationship between Congress and the President.") (quoting *The Pocket Veto Case,* 279 U.S. 655, 689 (1929)). In *Free Enterprise Fund,* for instance, the Court declined to extend *Humphrey's Executor* to the "novel structure" of requiring "an unusually high standard" of cause for a principal officer to remove an inferior officer, when the principal officer, in turn, could only be removed for cause. *Free Enter. Fund,* 561 U.S. at 496, 502-503. The Court has rightly been reluctant to expand *Humphrey's Executor* to "new situation[s] not yet encountered by the Court." *Id.* at 483.

Finally, there would be no meaningful limiting principle if *Humphrey's Executor* were extended beyond certain multi-member commissions to single-headed agencies like the Bureau. The functions, rather than the structure, of the FTC cannot alone justify the characterization as "quasi-legislative" or "quasi-judicial," because, as the Court later acknowledged in *Morrison*, "it is hard to dispute that the powers of the FTC at the time of *Humphrey's Executor* would at the present time be considered 'executive,' at least to some degree." *Morrison*, 487 U.S. at 690 n.28 (citation omitted); *accord Bowsher* 478 U.S. at 733 ("Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law."). The terms "quasi-legislative" and "quasi-judicial" thus must be understood to reflect the interactive and deliberative mode of decisionmaking that is expected of multi-member legislative and judicial bodies.

Given "[t]he difficulty of defining such categories of 'executive' or 'quasi-legislative' officials" based on function, *Morrison*, 487 U.S. at 689 n.28, the *PHH* court provided little basis for distinguishing even Cabinet officers like the Secretary of the Treasury. Indeed, the *PHH* majority opinion strongly suggests Congress could restrict the President's ability to remove any "financial regulator[ ]" and offers no limitation that would prevent Congress from similarly restricting the President's ability to remove the Secretary of the Treasury. Pet. App. 283a; see *id.* at 251a-252a, 281a-285a.[6]

d. The proper remedy for the constitutional violation is to sever the provision limiting the President's authority to remove the Bureau's Director. As explained in *Free Enterprise Fund,* when "'confronting a constitutional flaw in a statute,'" courts generally "'try to limit the solution to the problem,' severing any 'problematic portions while leaving the remainder intact.'" 561 U.S. at 508 (quoting *Ayotte* v. *Planned Parenthood of N. New England,* 546 U.S. 320, 328-329 (2006)). Even

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[6] If this Court were to grant review and conclude that *Humphrey's Executor* applies to single-headed agencies like the Bureau, it should consider whether that case should be overruled in part or in whole. That issue is fairly encompassed in the first question presented, and so there would be no need for this Court to separately grant review of that question. Similarly, any effect of the Bureau's funding scheme on the infringement on the President's exercise of executive authority could be considered as part of the first question. See Pet. App. 293a-294a (majority opinion); *id.* at 533a-534a & n.19 (Kavanaugh, J., dissenting). To the extent petitioners assert that the funding scheme presents a distinct constitutional problem, the question received only passing consideration in *PHH*, and petitioners provide no compelling reason for this Court to further consider it here. See *Byrd* v. *United States*, 138 S. Ct. 1518, 1527 (2018) ("[T]his is 'a court of review, not of first view.'") (citation omitted).

though Congress had not enacted a severability clause, the Court there held unconstitutional only the removal restriction pertaining to members of the Public Company Accounting Oversight Board, and went on to hold that the proper remedy was to invalidate the removal restriction, leaving the board members removable at will. *Id.* at 509. The Court reasoned that the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, would "'remain[] fully operative as a law' with these tenure restrictions excised," and no evidence suggested that Congress "would have preferred no Board at all to a Board whose members are removable at will." *Free Enter. Fund*, 561 U.S. at 509 (citations and internal quotation marks omitted).

The same result follows *a fortiori* here. Absent the for-cause removal provision, the Dodd-Frank Act and its Bureau-related provisions will remain "fully operative." *Free Enter. Fund*, 561 U.S. at 509 (citation omitted). And, as in *Free Enterprise Fund*, there is no evidence that Congress would have preferred no Bureau at all to a Bureau with a Director who is removable at will. See *ibid.* Moreover, unlike the statute at issue in *Free Enterprise Fund*, the Dodd-Frank Act includes a severability clause, providing that if one of the Act's provisions is "held to be unconstitutional," the remainder of the Act "shall not be affected thereby." 12 U.S.C. 5302. While it may be possible to conceive of other ways to remedy the constitutional violation, "[s]uch editorial freedom * * * belongs to the Legislature, not the Judiciary." *Free Enter. Fund*, 561 U.S. at 510.

For these reasons, in an appropriate case, the Court should hold that the removal restriction in 12 U.S.C. 5491(c)(3) impermissibly infringes the separation of

powers fundamental to our constitutional structure, and sever the provision from the rest of the Dodd-Frank Act.

3. The position expressed here is that of the United States, not the position of the Bureau to date. As noted, the Bureau possesses independent litigating authority in the lower courts. See 12 U.S.C. 5564. Under the leadership of Acting Director John Michael Mulvaney, the Bureau continued to defend the constitutionality of the Bureau's structure in those courts. On Thursday, December 6, 2018, the Senate confirmed Kathleen Kraninger to serve as the new Director of the Bureau. See 164 Cong. Rec. S7341 (daily ed. Dec. 6, 2018). This Office has been informed that Ms. Kraninger will soon be appointed and assume leadership of the Bureau.

In light of the United States' position in this case, if the Court were to grant the petition for a writ of certiorari, it would be the Court's usual practice to appoint an amicus curiae to defend the judgment of the court of appeals. Before following that approach here, however, the United States respectfully requests a reasonable opportunity for the new Senate-confirmed Director of the Bureau to determine whether the Bureau will seek to defend the court of appeals' judgment in this Court and for the Acting Solicitor General to determine whether he will authorize the Bureau to do so. See 12 U.S.C. 5564(e); cf., *e.g.*, Nat'l Labor Relations Bd. Br., *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612 (2018) (No. 16-307).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JEFFREY B. WALL*
Acting Solicitor General
JOSEPH H. HUNT
Assistant Attorney General
MARK B. STERN
DANIEL AGUILAR
Attorneys

DECEMBER 2018

* The Solicitor General is recused in this case.

EXHIBIT F

(<u>Consent Order</u> – In the Matter of: Mark Corbett)

UNITED STATES OF AMERICA
BUREAU OF CONSUMER FINANCIAL PROTECTION

ADMINISTRATIVE PROCEEDING
File No. 2019-BCFP-0002

In the Matter of: **Mark Corbett**	**CONSENT ORDER**

The Bureau of Consumer Financial Protection (Bureau) has reviewed Mark Corbett's brokering of contracts offering high-interest credit to veterans and has identified the following law violations committed by Corbett (Respondent, as defined below): (1) Respondent misrepresents to consumers that the contracts he facilitates are valid and enforceable when, in fact, the contracts are void because veterans' pension payments are unassignable under federal law; (2) Respondent misrepresents to consumers that the offered product is a purchase of payments and not a high-interest credit offer; (3) Respondent misrepresents to consumers when they will receive their funds; and (4) Respondent fails to disclose to consumers the applicable interest rate on the credit offer, in violation of §§ 1031 and 1036 of the Consumer Financial Protection Act of 2010 (CFPA), 12 U.S.C. §§ 5531, 5536.

Under §§ 1053 and 1055 of the CFPA, 12 U.S.C. §§ 5563, 5565, the Bureau issues this Consent Order (Consent Order).

I.

Jurisdiction

1. The Bureau has jurisdiction over this matter under §§ 1053 and 1055 of the CFPA, 12 U.S.C. §§ 5563 and 5565.

II.

Stipulation

2. Respondent has executed a "Stipulation and Consent to the Issuance of a Consent Order," dated January 14, 2019 (Stipulation), which is incorporated by reference and is accepted by the Bureau. By this Stipulation, Respondent has consented to the issuance of this Consent Order by the Bureau under §§ 1053 and 1055 of the CFPA, 12 U.S.C. §§ 5563 and 5565, without admitting or denying any of the findings of fact or conclusions of law, except that Respondent admits the facts necessary to establish the Bureau's jurisdiction over Respondent and the subject matter of this action.

III.

Definitions

3. The following definitions apply to this Consent Order:

a. "Affected Consumers" means veterans of the United States Armed forces who have Department of Veterans Affairs (VA) disability pensions or pensions administered by the Defense Finance and Accounting Service (DFAS) and who entered into contracts related to those pensions that were brokered by Respondent between 2011 and 2019.

b. "Assisting Others" means helping, aiding, or providing support to others, including but not limited to:

i. consulting in any form whatsoever;

ii. formulating or providing, or arranging for the formulation or provision of, any advertising or marketing material, including, but not limited to, any telephone sales script, direct mail solicitation, or the text of any Internet website, email, or other electronic communication;

iii. providing names of, or assisting in the generation of, potential customers; and

iv. participating in or providing services related to the offering, sale, or servicing of a product, or the collection of payments for a product.

c. "Effective Date" means the date on which the Consent Order is issued.

d. "Enforcement Director" means the Assistant Director of the Office of Enforcement for the Bureau of Consumer Financial Protection, or his or her delegate.

e. "Related Consumer Action" means a private action by or on behalf of one or more consumers or an enforcement action by another governmental agency brought against Respondent based on substantially the same facts as described in Section IV of this Consent Order.

f. "Relevant Period" includes the period from 2011 to 2017.

g. "Respondent" means Mark Corbett.

IV.

Bureau Findings and Conclusions

The Bureau finds the following:

4. Respondent is a "covered person" as that term is defined by 12 U.S.C. § 5481(5)-(7), (15)(A)(i).

5. Respondent, serving as an agent of companies Doe 1, 2, 3, and 4 (Doe Companies), brokers contracts offering high-interest credit to veterans. The

credit offers are marketed as purchases of veterans' future pension or disability payments.

6. Respondent, working as a broker for the Doe Companies, sets up contracts between veterans and investors where veterans receive a lump-sum payment, ranging from a few thousand to tens of thousands of dollars, and are thereafter obligated to repay a much larger amount by assigning to investors all or part of their monthly pension or disability payments. The veterans' obligations typically last five to ten years.

7. The high-interest credit offers Respondent brokers are for veterans who have Department of Veterans Affairs (VA) disability pensions or pensions administered by the Defense Finance and Accounting Service (DFAS). The VA establishes a veteran's level of disability compensation and administers disability pensions. DFAS is a federal agency within the Department of Defense; it includes an office that issues monthly pension payments to military retirees.

8. From at least 2011 through 2018, the Doe Companies' contracts required veterans to go into their VA or DFAS online portal and change their entire pension direct-deposits or their monthly allotments to be routed directly into a bank account controlled by the Doe Companies or their agents. If veterans contracted to sell only part of their pensions through the Doe Companies, the

Doe Companies would receive the veterans' entire pension direct-deposits or monthly allotments and then remit portions of them to the veterans' bank accounts.

9. Veterans can repay the contracts from sources other than the contracted-for income stream, such as a life insurance policy. In fact, veterans were required to purchase life insurance policies so that, should a veteran die and the income stream stop, the outstanding amount on the contract would still be paid.

10. Federal law prohibits agreements under which another person acquires the right to receive a veteran's pension payments. 38 U.S.C. § 5301(a)(3)(C).

11. Respondent operates websites that exist solely to direct consumers to the Doe Companies. When veterans search the internet for loans to veterans or for pension sales, they may encounter one of Respondent's websites. Respondent's marketing efforts appear to have been responsible for bringing in about 80% of the Doe Companies' consumer-side business.

12. Completion of an online form on one of Respondent's websites sends a veteran's contact information to Respondent. Respondent then contacts the veteran. Veterans describe to Respondent how much money they want to borrow and how much of their monthly pension allotment they want to pay each month. Respondent determines whether a veteran is a good candidate

for a purported pension sale and puts the veteran in contact with one of the Doe Companies.

13. Respondent determines with the Doe Companies the terms of the credit to be offered to the veterans, including the amount of the lump sum the veterans will receive.

14. Respondent is paid a commission by one of the Doe Companies based on the final profit the company expects to make from each purported pension sale. The company makes its profit on the front-end by having the investor pay a lump sum that is larger than the lump sum that is paid to the veteran.

15. Respondent represents to veterans that the Doe Companies' products are sales and not high-interest credit offers. For example, the first page of the "New Seller Information Packet," sent to veterans by Respondent, or by the Doe Companies at Respondent's direction, states, "It is important to note that this is not a loan[.]" The first paragraph of a form email sent with the packet states, "Please keep in mind that this is not a loan, you are selling a product for a set price."

16. In his communications with veterans who had ostensibly been matched with a buyer, Respondent routinely told veterans that they would receive their funds by a specific date or within a specified period. On multiple occasions, however, the Doe Companies did not deliver the funds to the veterans by the

promised date. Many veterans experienced funding delays, some as long as several months.

17. Respondent does not disclose to veterans the interest rates for the transactions he brokers. Respondent knows the credit offers have varied interest rates, depending on the length of the repayment period, but he does not inform veterans of these interest rates.

18. Many veterans realized the illegal nature of the transactions, and some complained directly to Respondent and the Doe Companies that the transactions are illegal. In response, Respondent repeatedly told veterans that the transactions were legal.

Findings and Conclusions as to Deception I

19. The contracts brokered by Respondent are void from inception because federal law prohibits agreements under which another person acquires the right to receive a veteran's pension payments. 38 U.S.C. § 5301(a)(3)(C).

20. Respondent repeatedly failed to disclose to consumers that the contracts he brokers are illegal because assignments of veterans' pensions are prohibited by federal law, and Respondent repeatedly misrepresented the contracts as valid and enforceable.

21. Respondent's failure to disclose the illegality of the contracts and his misrepresentations of the contracts as valid and enforceable are likely to mislead consumers acting reasonably under the circumstances.

22. Respondent's omissions and misrepresentations are material because they are likely to influence the decisions of consumers acting reasonably under the circumstances.

23. As described in Paragraphs 19 to 22, in connection with the advertising, marketing, promoting, offering for sale, or sale of high interest credit offers to veterans, in numerous instances, Respondent has represented, expressly or impliedly, to consumers that the contracts he brokers are legal, valid, and enforceable, even though assignments of veterans' pensions are prohibited by federal law.

24. Respondent's representations constitute deceptive acts or practices in violation of §§ 1031(a) and 1036(a)(1)(B) of the CFPA, 12 U.S.C. § 5536(a)(1)(B).

Findings and Conclusions as to Deception II

25. Respondent brokers contracts that provide for veterans to receive a lump-sum payment and thereafter repay a much larger total amount over time by assignment of their monthly pension or disability payments to the Doe Companies. The Doe Companies' products brokered by Respondent are high-interest credit offers.

26. Respondent represents to consumers that the Doe Companies' products are sales and not high-interest credit offers.

27. Reasonable consumers would likely be misled by Respondent's misrepresentations.

28. Respondent's misrepresentations regarding the nature of the products he brokers are material to consumers because they render a reasonable consumer unable to compare the cost of the Doe Companies' products with other potential sources of credit and are likely to influence the decisions of consumers acting reasonably under the circumstances.

29. Respondent's representations, as described in Paragraph 25 to 28, constitute deceptive acts or practices in violation of §§ 1031(a) and 1036(a)(1)(B) of the CFPA, 12 U.S.C. § 5536(a)(1)(B).

Findings and Conclusions as to Deception III

30. Respondent misrepresented to consumers that they would receive funds from the Doe Companies within a specified period when, in fact, many consumers would not receive funds by the specified date.

31. Respondent's misrepresentation were likely to mislead reasonable consumers.

32. Misrepresentations about the date by which consumers would receive lump-sum payments under the Doe Companies' contracts are material because they are likely to influence the decisions of consumers acting reasonably under the circumstances.

33. Respondent's representations, as described in Paragraph 30 to 32, constitute deceptive acts or practices in violation of §§ 1031(a) and 1036(a)(1)(B) of the CFPA, 12 U.S.C. § 5536(a)(1)(B).

Findings and Conclusions as to Unfairness

34. Respondent failed to inform consumers of the Doe Companies' products' interest rates.

35. Respondent caused or likely caused substantial injury to consumers because he prevented consumers from comparing alternative products. And by failing to inform consumers about the products' interest rates, Respondent deprived consumers of information they would need to determine whether

the product is usurious and therefore potentially unlawful under their state's law.

36. Consumers could not reasonably have avoided injury in this situation; consumers could not reasonably be expected to make the interest-rate calculation themselves, particularly after Respondent misrepresented that the product was not a high-interest credit offer and misrepresented the date by which consumers would receive lump-sum payments.

37. This injury was not outweighed by countervailing benefits to consumers or competition.

38. Section 1036(a)(1)(B) of the CFPA prohibits "unfair, deceptive, or abusive" acts or practices. 12 U.S.C. § 5536(a)(1)(B). An act or practice is unfair if it causes or is likely to cause consumers substantial injury that is not reasonably avoidable and is not outweighed by countervailing benefits to consumers or to competition.

39. Respondent's representations, as described in Paragraph 34 to 37, constitute unfair acts or practices in violation of §§ 1031(a) and 1036(a)(1)(B) of the CFPA, 12 U.S.C. §§ 5531(a), 5536(a)(1)(B).

ORDER

V.

Conduct Provisions

IT IS ORDERED, under §§ 1053 and 1055 of the CFPA, that:

40. Respondent, whether acting directly or indirectly, is permanently restrained from brokering, offering, and arranging agreements between veterans and third parties under which the veteran purports to sell a future right to an income stream from the veteran's pension. Respondent is also permanently restrained from Assisting Others in engaging in such conduct. Nothing in this Consent Order shall be read as an exception to this Paragraph.

VI.

Order to Pay Civil Money Penalties

IT IS FURTHER ORDERED that:

41. Under § 1055(c) of the CFPA, 12 U.S.C. § 5565(c), by reason of the violations of law described in Section IV of this Consent Order, taking into account the factors in 12 U.S.C. § 5565(c)(3) and having an inability to pay based on sworn financial statements provided to the Bureau on November 8, 2018, Respondent must pay a civil money penalty of $1 to the Bureau.

42. Within 10 days of the Effective Date, Respondent must pay the civil money penalty by wire transfer to the Bureau or to the Bureau's agent in compliance with the Bureau's wiring instructions.

43. The civil money penalty paid under this Consent Order will be deposited in the Civil Penalty Fund of the Bureau as required by § 1017(d) of the CFPA, 12 U.S.C. § 5497(d).

44. Respondent must treat the civil money penalty paid under this Consent Order as a penalty paid to the government for all purposes. Regardless of how the Bureau ultimately uses those funds, Respondent may not:

   a. Claim, assert, or apply for a tax deduction, tax credit, or any other tax benefit for any civil money penalty paid under this Consent Order; or

   b. Seek or accept, directly or indirectly, reimbursement or indemnification from any source, including but not limited to payment made under any insurance policy, with regard to any civil money penalty paid under this Consent Order.

45. To preserve the deterrent effect of the civil money penalty in any Related Consumer Action, Respondent may not argue that Respondent is entitled to, nor may Respondent benefit by, any offset or reduction of any compensatory monetary remedies imposed in any Related Consumer Action because of the civil money penalty paid in this action. If the court in any Related Consumer

Action offsets or otherwise reduces the amount of compensatory monetary remedies imposed against Respondent based on the civil money penalty paid in this action or based on any payment that the Bureau makes from the Civil Penalty Fund, Respondent must, within 30 days after entry of a final order granting such offset or reduction, notify the Bureau, and pay the amount of the offset or reduction to the U.S. Treasury. Such a payment will not be considered an additional civil money penalty and will not change the amount of the civil money penalty imposed in this action.

VII.

Additional Monetary Provisions

IT IS FURTHER ORDERED that:

46. In the event of any default on Respondent's obligations to make payment under this Consent Order, interest, computed under 28 U.S.C. § 1961, as amended, will accrue on any outstanding amounts not paid from the date of default to the date of payment, and will immediately become due and payable. Respondent must relinquish all dominion, control, and title to the funds paid to the fullest extent permitted by law and no part of the funds may be returned to Respondent.

47. Under 31 U.S.C. § 7701, Respondent, unless it already has done so, must furnish to the Bureau its taxpayer identifying number, which may be used

for purposes of collecting and reporting on any delinquent amount arising out of this Consent Order.

48. Within 30 days of the entry of a final judgment, consent order, or settlement in a Related Consumer Action, Respondent must notify the Enforcement Director of the final judgment, consent order, or settlement in writing. That notification must indicate the amount of redress, if any, that Respondent paid or is required to pay to consumers and describe the consumers or classes of consumers to whom that redress has been or will be paid.

VIII.

Reporting Requirements

IT IS FURTHER ORDERED that:

49. Respondent must notify the Bureau of any development that may affect compliance obligations arising under this Consent Order, including but not limited to the filing of any bankruptcy or insolvency proceeding by or against Respondent or a change in Respondent's name or address. Respondent must provide this notice, if practicable, at least 30 days before the development, but in any case no later than 14 days after the development.

50. Within 7 days of the Effective Date, Respondent must:

a. Designate at least one telephone number and email, physical, and postal address as points of contact, which the Bureau may use to communicate with Respondent;

b. Identify all businesses for which Respondent is the majority owner, or that Respondent directly or indirectly controls, by all of their names, telephone numbers, and physical, postal, email, and Internet addresses;

c. Describe the activities of each such business, including the products and services offered, and the means of advertising, marketing, and sales.

d. Identify Individual Respondent's telephone numbers and all email, Internet, physical, and postal addresses, including all residences;

e. Describe in detail Respondent's involvement in any business for which he performs services in any capacity or which he wholly or partially owns, including Respondent's title, role, responsibilities, participation, authority, control, and ownership.

51. Respondent must report any change in the information required to be submitted under Paragraph 50 at least 30 days before the change or as soon as practicable after the learning about the change, whichever is sooner.

52. Within 90 days of the Effective Date, and again one year after the Effective Date, Respondent must submit to the Enforcement Director an accurate written compliance progress report (Compliance Report), which, at a minimum:

a. Lists each applicable paragraph and subparagraph of the Order and describes in detail the manner and form in which Respondent has complied with each such paragraph and subparagraph of the Consent Order; and

b. Attaches a copy of each Order Acknowledgment obtained under Section IX unless previously submitted to the Bureau.

IX.

Order Distribution and Acknowledgment

IT IS FURTHER ORDERED that:

53. Within 7 days of the Effective Date, Respondent must submit to the Enforcement Director an acknowledgment of receipt of this Consent Order, sworn under penalty of perjury.

54. Within 30 days of the Effective Date, Respondent, for any business for which he is the majority owner or which he directly or indirectly controls, must deliver a copy of this Consent Order to employees, Service Providers,

or other agents and representatives who have responsibilities related to the subject matter of the Consent Order.

55. For 5 years from the Effective Date, Respondent, for any business of which he is the majority owner or that he directly or indirectly controls must deliver a copy of this Consent Order to any business entity resulting from any change in structure referred to in Section VIII, any future employees, Service Providers, or other agents and representatives who will have responsibilities related to the subject matter of the Consent Order before they assume their responsibilities.

56. Respondent must secure a signed and dated statement acknowledging receipt of a copy of this Consent Order, ensuring that any electronic signatures comply with the requirements of the E-Sign Act, 15 U.S.C. § 7001 *et seq.*, within 30 days of delivery, from all persons receiving a copy of this Consent Order under this Section.

X.

Recordkeeping

IT IS FURTHER ORDERED that:

57. Respondent must create, or if already created, must retain for 5 years from the date of the Consent Order, the following business records for any business of which Respondent is a majority owner or that he directly or

indirectly controls:

a. All documents and records necessary to demonstrate full compliance with each provision of this Consent Order, including all submissions to the Bureau; and

b. All consumer complaints and refund requests (whether received directly or indirectly, such as through a third party) related to contracts with veterans brokered by Respondent, and any responses to those complaints or requests.

58. Respondent must retain the documents identified in Paragraph 57 for the duration of the Consent Order.

59. Respondent must make the documents identified in Paragraph 57 available to the Bureau upon the Bureau's request.

XI.

Notices

IT IS FURTHER ORDERED that:

60. Unless otherwise directed in writing by the Bureau, Respondent must provide all submissions, requests, communications, or other documents relating to this Consent Order in writing, with the subject line, "In re Mark Corbett, File No. 2019-BCFP-0002," and send them by overnight courier or

first-class mail to the below address and contemporaneously by email to Enforcement_Compliance@cfpb.gov:

Assistant Director for Enforcement
Bureau of Consumer Financial Protection
ATTENTION: Office of Enforcement
1700 G Street, N.W.
Washington D.C. 20552.

XII.

Cooperation with the Bureau

IT IS FURTHER ORDERED that:

61. Respondent must cooperate fully to help the Bureau determine the identity and location of, and the amount of injury sustained by, each Affected Consumer. Respondent must provide such information in his or his agents' possession or control within 14 days of receiving a written request from the Bureau.

62. Respondent must cooperate fully with the Bureau in this matter and in any investigation related to or associated with the conduct described in Section IV. Respondent must provide truthful and complete information, evidence, and testimony. Respondent must appear for interviews, discovery, hearings, trials, and any other proceedings that the Bureau may reasonably request upon 10 days written notice, or other reasonable notice, at such places and

times as the Bureau may designate, without the service of compulsory process.

XIII.

Compliance Monitoring

IT IS FURTHER ORDERED that:

63. Within 14 days of receipt of a written request from the Bureau, Respondent must submit additional Compliance Reports or other requested non-privileged information, related to requirements of this Consent Order, which must be made under penalty of perjury; provide sworn testimony related to requirements of this Consent Order and Respondents' compliance with those requirements; or produce non-privileged documents related to requirements of this Consent Order and Respondents' compliance with those requirements.

64. For purposes of this Section, the Bureau may communicate directly with Respondent, unless Respondent retains counsel related to these communications.

65. Respondent must permit Bureau representatives to interview any employee or other person affiliated with Respondent who has agreed to such an interview about the requirements of this Consent Order and Respondent's

compliance with those requirements. The person interviewed may have counsel present.

66. Nothing in this Consent Order will limit the Bureau's lawful use of civil investigative demands under 12 C.F.R. § 1080.6 or other compulsory process.

XIV.

Modifications to Non-Material Requirements

IT IS FURTHER ORDERED that:

67. Respondent may seek a modification to non-material requirements of this Consent Order (*e.g.*, reasonable extensions of time and changes to reporting requirements) by submitting a written request to the Enforcement Director.

68. The Enforcement Director may, in his or her discretion, modify any non-material requirements of this Consent Order (*e.g.*, reasonable extensions of time and changes to reporting requirements) if he or she determines good cause justifies the modification. Any such modification by the Enforcement Director must be in writing.

XV.

Administrative Provisions

IT IS FURTHER ORDERED that:

69. The provisions of this Consent Order do not bar, estop, or otherwise prevent the Bureau, or any other governmental agency, from taking any other action against Respondent, except as described in Paragraph 70.

70. The Bureau releases and discharges Respondent from all potential liability for law violations that the Bureau has or might have asserted based on the practices described in Section IV of this Consent Order, to the extent such practices occurred before the Effective Date and the Bureau knows about them as of the Effective Date. The Bureau may use the practices described in this Consent Order in future enforcement actions against Respondent and its affiliates, including, without limitation, to establish a pattern or practice of violations or the continuation of a pattern or practice of violations or to calculate the amount of any penalty. This release does not preclude or affect any right of the Bureau to determine and ensure compliance with the Consent Order, or to seek penalties for any violations of the Consent Order.

71. This Consent Order is intended to be, and will be construed as, a final Consent Order issued under § 1053 of the CFPA, 12 U.S.C. § 5563, and

expressly does not form, and may not be construed to form, a contract binding the Bureau or the United States.

72. This Consent Order will remain effective and enforceable, except to the extent that, and until such time as, any provisions of this Consent Order have been amended, suspended, waived, or terminated in writing by the Bureau.

73. Calculation of time limitations will run from the Effective Date and be based on calendar days, unless otherwise noted.

74. Should Respondent seek to transfer or assign all or part of its operations that are subject to this Consent Order, Respondent must, as a condition of sale, obtain the written agreement of the transferee or assignee to comply with all applicable provisions of this Consent Order.

75. The provisions of this Consent Order will be enforceable by the Bureau. For any violation of this Consent Order, the Bureau may impose the maximum amount of civil money penalties allowed under § 1055(c) of the CFPA, 12 U.S.C. § 5565(c). In connection with any attempt by the Bureau to enforce this Consent Order in federal district court, the Bureau may serve Respondent wherever Respondent may be found and Respondent may not contest that court's personal jurisdiction over Respondent.

76. This Consent Order and the accompanying Stipulation contain the complete agreement between the parties. The parties have made no promises,

representations, or warranties other than what is contained in this Consent Order and the accompanying Stipulation. This Consent Order and the accompanying Stipulation supersede any prior oral or written communications, discussions, or understandings.

77. Nothing in this Consent Order or the accompanying Stipulation may be construed as allowing the Respondent, to violate any law, rule, or regulation.

IT IS SO ORDERED, this 21 day of January, 2019.

Kathleen L. Kraninger

Kathleen L. Kraninger
Director
Bureau of Consumer Financial Protection

EXHIBIT G

(<u>Case Law</u> – United States vs. Kernan Hospital)

KeyCite Yellow Flag - Negative Treatment
Distinguished by In re Civil Investigative Demand 15-439, W.D.Va., August 12, 2016

2012 WL 5879133
Only the Westlaw citation is currently available.
United States District Court, D. Maryland.

UNITED STATES of America, Plaintiff,
v.
KERNAN HOSPITAL, Defendant.

Civil Action No. RDB–11–2961.
|
Nov. 20, 2012.

MEMORANDUM OPINION

RICHARD D. BENNETT, District Judge.

***1** Defendant Kernan Hospital has filed this Petition to Set Aside a civil investigative demand that the United States Government, the Plaintiff in this False Claims Act case,[1] served on Kernan Hospital on August 23, 2012. In an earlier Memorandum Opinion, this Court dismissed without prejudice the Government's original complaint for its failure to plead fraud with particularity under Rule 9(b) of the Federal Rules of Civil Procedure. *See* Mem. Op. 16–22, ECF No. 26. Now the Government has issued a civil investigative demand pursuant to 31 U.S.C. § 3733(a)(1). The Government contends that this civil investigative demand is necessary to cure the deficiencies in its original fraud allegations. The parties' submissions have been reviewed and no hearing is necessary. *See* Local Rule 105.6 (D.Md.2011). For the reasons that follow, Defendant Kernan Hospital's Petition to Set Aside Civil Investigative Demand (ECF No. 29) is GRANTED.

BACKGROUND

The facts of this case pertaining to the original complaint alleging violations under the False Claims Act are fully set forth in this Court's earlier Memorandum Opinion issued on July 30, 2012. Mem. Op. 2–7, ECF No. 26. On October 17, 2011, the Plaintiff United States Government ("the Government") filed a complaint against the Defendant Kernan Hospital ("Kernan" or "Defendant"), alleging that Kernan presented false claims to the Government. Specifically, the Government alleged that Kernan devised a scheme to increase its Medicare, Medicaid, and Tricare reimbursement by systematically "upcoding"[2] secondary diagnoses concerning malnutrition.

Before filing its complaint, the Government initiated an investigation into this alleged upcoding scheme that ultimately lasted three years. According to Kernan, the investigation began on June 3, 2008, when the Office of the Inspector General issued a subpoena (the "June 2008 subpoena") to Kernan, requesting documents—including patient records, employee files, coding personnel records, physician queries relating to malnutrition, internal documents relating to the hospital's coding system, training records for physicians and coding and billing personnel, the hospital's annual cost reports, and communications with the Health Services Cost Review Commission—related to the coding of malnutrition as a secondary diagnosis during a period from 2005 to 2007.[3] After the parties conferred on this subpoena, the Government requested a more narrow production of 100 specifically identified medical records on March 4, 2009, *see* Def.'s Ex. 2, ECF No. 29–2, and Kernan complied with that request on April 6, 2009, *see* Def.'s Ex. 3, ECF No. 29–3, producing 15,686 pages. On April 20, 2009, the Government requested the coding summary sheets that corresponded to the 100 medical records, *see* Def.'s Ex. 4, ECF No. 29–4, and Kernan produced them on April 29, 2009, *see* Def.'s Ex. 5, ECF No. 29–5.

On May 18, 2011, more than two years after the Government's initial production requests, the Government asked Kernan to respond to the June 2008 subpoena. *See* Def.'s Ex. 6, ECF No. 29–6. On June 2, 2011, Kernan produced 1,709 pages of documents in response to the June 2008 subpoena. *See* Def.'s Ex. 7, ECF No. 29–7. Then on August 2, 2011, Kernan produced additional documents responsive to the June 2008 subpoena. *See* Def.'s Ex. 8, ECF No. 29–8. Kernan again supplemented its production of documents on September 29, 2011. *See* Def.'s Ex. 9, ECF No. 29–9. All told, Kernan produced 2,996 pages in response to the Government's June 2008 subpoena. Def.'s Pet. to Set Aside 2.

***2** On September 7, 2011, the Government issued a civil

investigative demand,[4] seeking deposition testimony from Martha Green, the Director of Health Information Management for Kernan. Two weeks later, on September 22, the Government deposed Ms. Green at the United States Attorney's Office in Baltimore, Maryland. Based on the information obtained from the three-year investigation into Kernan's alleged scheme of upcoding, the Government filed a False Claims Act suit as well as alleged breach of fiduciary duties, unjust enrichment, and payment under mistake of fact. *See* Compl. 19–24, ECF No. 1. Kernan filed two separate motions to dismiss, one based on the Government's failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure ("Federal Rules"), and the other based on its failure to plead fraud with sufficient particularity pursuant to Rule 9(b) of the Federal Rules. *See* Mot. to Dismiss, ECF No. 6; Mot. to Dismiss, ECF No. 10. This Court granted Kernan's Motion to Dismiss all counts of the complaint, concluding that the Government had failed to adequately plead its fraud allegations, and dismissed the Government's complaint without prejudice.[5]

On August 23, 2012, the Government served Kernan with the civil investigative demand that is at issue in the pending petition. *See* Def.'s Ex. 11, ECF No. 29–11. This civil investigative demand requires Kernan to submit documents—including medical records, patient files, coding summary forms, and e-mail communications—regarding Kernan's coding practices and the coding of malnutrition as a secondary diagnosis. *Id.* Some of these requests are for documents during a period from January 1, 2004 to present, and others are for documents during a period from January 1, 2005 to present. *Id.* This most recent civil investigative demand mirrors, for the most part, the requests in the June 3, 2008 subpoena. *Id.* However, it does request some unique documents as well as seeks documents from an expanded time period.[6]

Kernan has petitioned this Court to set aside the most recent civil investigative demand, arguing that section 3733 of the False Claims Act allows the Government to issue a civil investigative demand only "before commencing a civil proceeding" under the False Claims Act. Because the Government already commenced a proceeding and the second civil investigative demand relates to the same proceeding, Kernan argues that the Government is without authority to issue the demand. The Government contends that section 3733 inherently deprives the Attorney General of the power to issue a civil investigative demand only if the suit is pending. Because this False Claims Act case is closed, the Government reasons, the parties are in the same positions as they were before suit. Thus the Government contends that it has the authority to issue the demand in its pursuit of evidence to overcome its earlier pleading deficiencies. It makes this contention after already having conducted a three-year investigation of Kernan's coding practices, which accumulated nearly 19,000 documents, and determining that it was prepared to bring suit against Kernan.

STANDARD OF REVIEW

***3** Section 3733 empowers an Attorney General or a designee, "before commencing a civil proceeding under § 3730(a) or other false claims law," to issue a "civil investigative demand" requesting documents, responses to written interrogatories, or deposition testimony. 31 U.S.C. § 3733(a)(1). The civil investigative demand functions as a "prefiling information-gathering tool to perceive widespread fraud" against the government. *United States v. Witmer,* 835 F.Supp. 201, 206 (M.D.Pa.1993), *order vacated in part on other grounds on reconsideration,* 835 F.Supp. 208 (M.D.Pa .1993). This investigative tool provides the government "with a means to assess quickly, and at the least cost to the taxpayers or to the party from whom information is requested, whether grounds exist for initiating a false claim suit." *United States v. Markwood,* 48 F.3d 969, 979 (6th Cir.1995).

The civil investigative demand provision was added to the False Claims Act in 1986 "as part of an extensive revision of the Act." *Avco Corp. v. U.S. Dep't of Justice,* 884 F.2d 621, 622 (D.C.Cir.1989). In particular, section 3733 was included to remedy the "serious roadblocks to obtaining information as well as weaknesses in [investigative tools]," including the government's limited investigative resources and the fact that civil attorneys "have no authority to compel production of documents or depositions prior to filing suit." S.Rep. No. 99–345, at 3–6 (1986). In one of the few cases to examine the workings of section 3733, the United States Court of Appeals for the D.C. Circuit remarked that "it is evident to anyone reading the statute ... that the Attorney General may not employ the power granted by this section after he has commenced a false claims action." *Avco Corp.,* 884 F.2d at 623.

ANALYSIS

The crux of this dispute concerns the statutory limitations on the False Claims Act's civil investigative demand, 31 U.S.C. § 3733. In its petition, Kernan argues that because the Government already commenced a False Claims Act suit, basing its allegations on information discovered during a three-year investigation of the hospital's coding practices, the Government cannot now issue a civil investigative demand. The Government disputes Kernan's petition, contending that it has renewed authority to issue a civil investigative demand because this Court dismissed the Government's complaint without prejudice and closed the case.

There is little case law construing the metes and bounds of the False Claims Act's civil investigative demand. The case that comes closest to addressing the issue before this Court is *Avco Corporation v. United States,* in which the Court of Appeals for the D.C. Circuit decided that the filing of a qui tam complaint did not preclude the Attorney General from issuing a civil investigative demand. 884 F.2d 621. In *Avco,* a relator brought a quit tam action against Avco Corporation, alleging violations of the False Claims Act. *Id.* at 622. After receiving a copy of the qui tam complaint, the Attorney General initiated his own investigation and issued a civil investigative demand on an Avco employee with knowledge of Avco's work for the United States Coast Guard. *Id.* at 622–23. The employee filed a petition to set aside the civil investigative demand, arguing that the relator's filing of a qui tam proceeding "cut off the power of the Attorney General" to issue a civil investigative demand. *Id.* at 623. Relying on the plain meaning of section 3733, the Court of Appeals found that the Attorney General's power to issue a civil investigative demand was circumscribed only by his own intervention in a False Claims Act suit. *Id.* at 623–24. "It is evident to anyone reading the statute," the court stated, "that the Attorney General may not employ the power granted by [section 3733] after he has commenced a false claims action." *Id.* at 623.

***4** The D.C. Circuit's opinion in *Avco* does not touch on the issue presented to this Court: whether the Government can issue a civil investigative demand after having initiated an investigation into possible False Claims Act violations and filed suit on the basis of that investigation. Section 3733 sets out a prefiling limitation on the use of the civil investigative demand, yet neither the statute nor the case law interpreting it suggests whether that limitation expires after an initial complaint is dismissed. Indeed, the Government in this case acknowledges that there is no case law or authority addressing the issue before this Court. Pl.'s Opp. 5.

The Government, however, advances two reasons why this Court should deny Kernan's petition. First, the Government argues that section 3733 inherently deprives the Attorney General of the power to issue a civil investigative demand only if a suit is pending. Pl .'s Opp. 3. This reading of the statute relies on the Government's understanding of the disposition of this case. Because its complaint was dismissed without prejudice and the case was closed, the Government argues that the two parties are put "in the same position as though [a] suit had not been filed." *Id.* at 3–4. To bolster this point the Government cites *McLean v. United States,* 566 F.3d 391 (4th Cir.2009). In *McLean,* the Court of Appeals for the Fourth Circuit found, in the context of determining a prisoner's eligibility for in forma pauperis status, that a "dismissal without prejudice for failure to state a claim is not an adjudication on the merits ... and 'permits a plaintiff to refile the complaint as though it had never been filed.' " 566 F.3d at 396 (internal citations omitted). Thus, in the absence of a pending suit the Government argues that it wields the same authority it had before commencing a civil proceeding against Kernan.

Because the Government's argument turns on the meaning of the statute, this Court must apply the well settled canons of statutory interpretation. The starting point for interpreting a statute is "the language of the statute itself." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.,* 447 U.S. 102, 108 (1980). "[R]esort may be had to legislative history" where the statute's language is ambiguous or the ordinary meaning would lead to an absurd or futile result. *Avco Corp.,* 884 F.2d at 625 (internal citation omitted). The Government suggests that section 3733 contains a second-order limitation-the prefiling limitation itself is limited, the Government proposes, to the period during which a suit is pending. Though the Government maintains that this limitation is "inherent" in the statute, Pl.'s Opp. 3, this Court finds that the Government's argument is unavailing.

Looking first to the plain meaning of the statute, this Court does not detect an inherent limitation on section 3733 that would grant the Government power to issue a civil investigative demand at this stage. Section 3733 grants an Attorney General or a designee the power to issue a civil investigative demand "before commencing a civil proceeding under § 3730(a) or other false claims law." 31 U.S.C. § 3733(a)(1). As the D.C. Circuit found in *Avco,* "it is evident to anyone reading the statute ... that the Attorney General may not employ the power granted by this section after he has commenced a false claims action." 884 F.2d at 623. However, an examination of the plain words of the statute does not invite an interpretation of "before commencing a civil proceeding" to include the

period after the commencement of a civil proceeding when no suit is pending, and the Government does not propose how section 3733 could be read in such a way.

***5** Because the plain meaning of section 3733 does not speak to the issue presented in this case, this Court finds that the statute is ambiguous on the issue. Thus, this Court may refer to the legislative history to determine if there is some period after the commencement of a False Claims Act proceeding when the Government could, in keeping with section 3733, issue a civil investigative demand. *See Avco Corp.,* 884 F.2d at 625 ("[R]esort may be had to legislative history when a statute is ambiguous." (internal citation omitted)). Indeed, the legislative history, which includes both the Senate Report on the False Claims Amendments Act of 1986 ("Senate Report") and the corresponding report from the House of Representatives ("House Report"), is helpful in this case. In designing a civil investigative demand for the False Claims Act, the Senate Report describes that Congress aimed to remedy the Government's "inadequate investigative tools." S.Rep. No. 99–345, at 4. In particular, the Senate recognized that "some cases are weeded out and not filed because information is missing-information that might have turned up through pre-suit investigation if the tools were available." *Id.* The House Report echoes the Senate Report's concern that without a prefiling subpoena power the Government was unable to properly assess whether to commence a case under the False Claims Act:

> Currently, the Government must make a determination whether to file a civil fraud case based on sketchy information. Often, the Government files a suit and institutes discovery and only then discovers that there is not enough evidence to pursue the case. The Committee determined that the use of [civil investigative demands] would enable the Government to determine whether enough evidence existed to warrant the expense of filing suit, as well as to prevent the potential defendant from being dragged into court unnecessarily.

H.R.Rep. No. 99–660, at 26 (1986). This legislative history suggests that when Congress circumscribed the period during which the Government could issue a civil investigative demand to the prefiling stage, it did not mean to provide the Government with that power at any time a suit was not pending. At the prefiling stage, the Government is able to gather the information it needs "to determine whether enough evidence existed to warrant the expense of filing suit." *Id.* After the suit has been filed, the civil investigative demand no longer serves its purpose as expressed in the legislative history.

In this case, the Government conducted a three-year investigation of Kernan's coding practices and made use of section 3733's civil investigative demand before filing suit. This investigation provided the Government with nearly 19,000 documents to use in its False Claims Act complaint. An examination of the statute does not suggest, as the Government argues, that it has renewed power to issue a civil investigative demand at this stage. Rather, the plain meaning of the statute makes clear that the tool is to be used "before commencing a civil proceeding." 31 U.S.C. § 3733(a)(1). Moreover, the legislative history confirms that the civil investigative demand is a prefiling investigative tool that Congress created to aid the Government in deciding whether to file suit in the first place. The Government already determined that the False Claims Act suit against Kernan was worthwhile. For these reasons, this Court finds that the Government may no longer exercise the civil investigative demand power under section 3733 with respect to its allegations that Kernan engaged in fraud by upcoding secondary diagnoses concerning malnutrition.

***6** The Government's second argument is based on policy. This Court granted Kernan's Motion to Dismiss for failure to plead fraud with particularity. That dismissal was without prejudice. Accordingly, based upon the exhaustive discovery already conducted, the Government may file an amended complaint claiming fraud, or perhaps breach of contract or negligence. The Government contends that the granting of the subject Motion to Set Aside Civil Investigative Demand would prevent it from obtaining the information it needs to cure pleading deficiencies. *See* Pl.'s Opp. 5. The Government argues that "Kernan Hospital cannot have it both ways." *Id.* At this stage of the proceeding, the information that the most recent civil investigative demand requests is needed, states the Government, to "plead[ ] a recognized claim with the requisite particularity." *Id.*

The problem with this argument, however, is that the Government is not, as it seems to suggest, stuck between a rock and a hard place. The Government conducted a lengthy investigation of Kernan's coding practices and decided after three years that it was prepared to file suit. During its investigation, the Government received nearly

19,000 pages of information as well as deposition testimony pursuant to a civil investigative demand and several document requests. This Court is not persuaded that the Government needs to exercise its section 3733 power before it can sufficiently amend its complaint. Rather, the circumstances of this case suggest that the Government conducted a thorough investigation and gathered the information it needed to determine whether to file suit. The length and depth of the investigation, along with the fact that the Government's recent civil investigative demand seeks documents within the same universe of information it already had the opportunity to access, reveals that the Government took full advantage of its section 3733 power in preparation for filing suit.

It is worth stressing the sheer volume of documents that the Government procured during its prefiling investigation of Kernan and the opportunity the Government now has to amend its first complaint. Through various subpoenas, the Government received 100 specifically identified medical records; documents relating to the coding of malnutrition as a secondary diagnosis, including patient records, physician queries, employee files, and training records; and deposition testimony from Kernan's Director of Health Information Management. Except for the Government's claim in its Opposition to Kernan's Petition to Set Aside Civil Investigative Demand that Kernan has "never produced emails," the Government does not address any additional information requested. *See* Pl.'s Opp. 5. On the contrary, the fact that the investigation resulted in nearly 19,000 documents suggests that Kernan made a good faith effort to comply with the Government's many prefiling requests.

If, despite the volume of material provided to it in discovery, the Government still finds itself unable to plead the alleged fraudulent scheme with particularity, it has other options. The Government certainly has the opportunity to bring a claim for alleged contractual overbilling based on the underlying facts of this case. However, to the extent that the Government chooses to continue to pursue a fraud claim, it must satisfy Rule 9(b)'s heightened pleading standard. As this Court explained in its previous Memorandum Opinion, "Rule 9(b)'s directive that 'the circumstances constituting fraud or mistake shall be stated with particularity' does not permit a False Claims Act plaintiff merely to describe a private scheme in detail but then to allege simply and without any stated reason for his belief that claims requesting illegal payments must have been submitted, were likely submitted or should have been submitted to the Government." Mem. Op. 20 (quoting *United States ex rel. Clausen v. Lab. Corp. of Am.*, 290 F.3d 1301, 1311 (11th Cir.2002)). The Government's first complaint failed to allege with particularity the crucial circumstances of the alleged fraudulent scheme. The Government has been given the opportunity to amend its complaint if it so chooses, but this opportunity does not grant the Government the right to rehash the prefiling investigation that it conducted for over three years.

*7 It is also important to consider the potential damage this False Claims Act suit has caused to Kernan's goodwill and reputation. Both the civil investigative demand provision and Rule 9(b) of the Federal Rules are intended to encourage careful behavior when alleging fraudulent conduct. The Senate Report emphasized that the civil investigative demand is a tool to be used by "the responsible Assistant Attorney General." S.Rep. No. 99–345, at 24. The House Report envisioned that the civil investigative demand would prevent unnecessary lawsuits and be used "[not] in every potential civil fraud case, but only in those instances where it is absolutely necessary to determine whether a fraud action under the Act is appropriate." H.R.Rep. No. 99–660, at 26. Likewise, one of the purposes of Rule 9(b) is to protect "defendants from harm to their goodwill and reputation." *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir.1999). Thus this Court finds that construing section 3733 to prevent the Government from filing a civil investigation demand at this stage is in keeping with the policy goals underlying both section 3733 and Rule 9(b). Accordingly, this Court grants Kernan's petition to set aside the Government's civil investigative demand, which the Government issued after commencing its False Claims Act suit.

CONCLUSION

For the reasons stated above, Defendant Kernan Hospital's Petition to Set Aside Civil Investigative Demand (ECF No. 29) is GRANTED.

A separate Order follows.

ORDER

For the reasons stated in the foregoing Memorandum Opinion, it is this 20th day of November 2012,

ORDERED that:

1. Kernan Hospital's Petition to Set Aside Civil Investigative Demand (ECF No. 29) is GRANTED; and

2. The Clerk of the Court transmit copies of this Order and accompanying Memorandum Opinion to the parties.

All Citations

Not Reported in F.Supp.2d, 2012 WL 5879133

Footnotes

1 31 U.S.C. §§ 3729, *et seq.*

2 " 'Upcoding,' a common form of Medicare fraud, is the practice of billing Medicare for medical services or equipment designated under a code that is more expensive than what a patient actually needed or was provided." *United States ex rel. Bledsoe v. Cmty. Health Sys., Inc.,* 342 F.3d 634, 637 n.3 (6th Cir.2003) (citing Bonnie Schreiber *et al., Health Care Fraud,* 39 Am.Crim. L.Rev. 707, 750 n.331 (2002)).

3 Def.'s Pet. to Set Aside 1, ECF No. 29; Def.'s Ex. 1, ECF No. 29–1. Kernan sets out facts pertaining to the Government's three-year investigation in its Petition to Set Aside Civil Investigative Demand. The Government does not refute these facts except to say that Kernan did not fully comply with the Government's production requests. *See* Pl.'s Opp. 5, ECF No. 34. Specifically, the Government maintains that "Kernan Hospital has never produced emails." *Id.*

4 Section 3733 of the False Claims Act empowers an Attorney General or a designee, "before commencing a civil proceeding under § 3730(a) or other false claims law," to issue a "civil investigative demand." 31 U.S.C. § 3733(a)(1). The civil investigative demand requires a person who may be in possession of information relevant to a false claims investigation to produce that information in the form of documents, answers to written interrogatories, or oral testimony. *Id.*

5 *See* Mem. Op. 16–22. The disposition of this case is disputed by the parties. Kernan claims that in dismissing the Government's complaint, this Court, "though not required to do so, ... granted leave for the government to file an amended complaint." Def.'s Pet. to Set Aside 3. The Government responds that in dismissing the complaint, this Court closed the case. Pl.'s Opp. 3. The case is closed, and this Court has not granted leave for the Government to amend its complaint. However, this Court dismissed the complaint without prejudice so that the Government would have an opportunity to plead the allegations of fraud with more particularity. *See* Mem. Op. 22 ("To state a claim under the Act in this case, the Government must describe *what* false statements were submitted to the government, and more importantly, *how* those submissions affected the hospital's reimbursement." (emphasis in original)).

6 Kernan contends that, aside from expanding the relevant time period to include the years 2004 and 2008 to present, the second civil investigative demand issued in August 2012 seeks the same documents as the June 3, 2008 subpoena. Def.'s Pet. to Set Aside 4. A review of the two civil investigative demands reveals that although most of the prefiling requests and the requests in the civil investigative demands are quite similar, the second civil investigative demand contains some unique requests. *See, e.g.,* Def.'s Ex. 11 at 6 ¶¶ 4–6, 9–10 (requesting, for example, documents relating to malnutrition as a secondary diagnosis from January 1, 2004 to present; documents relating to conversations between Kernan and HP3, Inc. or Navigant, Inc.; and documents relating to any audit of the Kernan query process).

End of Document

EXHIBIT H

(Complaint re: Bureau of Consumer Financial Protection vs. Future Income Payments, LLC, et al.)

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

BUREAU OF CONSUMER FINANCIAL PROTECTION, Plaintiff, v. FUTURE INCOME PAYMENTS, LLC; FIP, LLC; CASH FLOW INVESTMENT PARTNERS LLC; PENSION ADVANCE LLC; BUYSELLANNUITY INC.; CASH FLOW INVESTMENT PARTNERS EAST LLC; CASH FLOW INVESTMENT PARTNERS MIDEAST LLC; LUMPSUM PENSION ADVANCE ATLANTIC LLC; LUMPSUM PENSION ADVANCE SOUTHEAST LLC; LUMPSUM SETTLEMENT WEST LLC; PAS CALIFORNIA LLC; PAS GREAT LAKES LLC; PAS NORTHEAST LLC; PAS SOUTHWEST LLC; PENSION ADVANCE CAROLINAS LLC; PENSION ADVANCE MIDWEST LLC; PENSION LOANS SOUTH LLC; SCOTT KOHN; and DOES 1-100, Defendants.	Case No. **COMPLAINT FOR VIOLATIONS OF THE CONSUMER FINANCIAL PROTECTION ACT OF 2010 AND THE TRUTH IN LENDING ACT**

The Bureau of Consumer Financial Protection (Bureau) brings this action against Future Income Payments, LLC (formerly known as Pensions, Annuities, and Settlements, LLC); FIP, LLC; Cash Flow Investment Partners LLC; Pension Advance LLC; BuySellAnnuity Inc.; Cash Flow Investment Partners East LLC; Cash Flow Investment Partners MidEast LLC; Lumpsum Pension Advance Atlantic LLC; Lumpsum Pension Advance Southeast LLC; Lumpsum Settlement West LLC; PAS California LLC; PAS Great Lakes LLC; PAS Northeast LLC; PAS Southwest LLC; Pension Advance Carolinas LLC; Pension Advance Midwest LLC; Pension Loans South LLC; Scott Kohn; and Does 1-100, under the Consumer Financial Protection Act of 2010 (CFPA), 12 U.S.C. §§ 5531, 5536(a), 5564, and 5565, and the Truth in Lending Act (TILA), 15 U.S.C. § 1638(a)-(b), and alleges as follows.

Introduction

1. Defendant Scott Kohn, through the above-named companies and others unknown to the Bureau (together, "Defendants"), offers consumers lump-sum payments in exchange for which the consumers authorize Defendants to periodically debit the accounts in which the consumers deposit their pensions or other future income streams.

2. Defendants represent to consumers, among other things, that these lump-sum payments are not "loans," that there is no applicable interest rate, and that the cost of the lump-sum advance is less than that of potential alternative sources of funds, such as credit cards.

3. In fact, Defendants' product is a loan and is more costly than alternative financial products to which Defendants draw comparisons. Defendants misrepresent material aspects of their product. Defendants thus engage in deceptive acts and practices as well as other violations of "Federal consumer financial law," 12 U.S.C. § 5565(a)(1).

4. Numerous state and local regulators and agencies also have concluded that Defendants' product is a loan for purposes of applicable state laws. These agencies include the California Department of Business Oversight; the Los Angeles City

Attorney's Office; the Minnesota Attorney General; the Colorado Attorney General; the Massachusetts Attorney General; the North Carolina Attorney General; the Iowa Attorney General; the Virginia Attorney General; the Oregon Attorney General; the Oregon Department of Consumer and Business Services; the Illinois Attorney General; the Illinois Department of Financial and Professional Regulation; the Maryland Attorney General; the Maryland Commissioner of Financial Regulation; the Pennsylvania Department of Banking and Securities; the New York State Department of Financial Services; and the State of Washington Department of Financial Institutions.

5. Defendants' product lures in vulnerable consumers, including senior citizens, disabled military veterans, and their spouses, who are in need of immediate cash.

6. The Bureau brings this suit to secure injunctive relief, other monetary and equitable relief, and civil money penalties.

Jurisdiction and Venue

7. This Court has subject-matter jurisdiction over this action because it is brought under "Federal consumer financial law," 12 U.S.C. § 5565(a)(1); presents a federal question, 28 U.S.C. § 1331; and is brought by an agency of the United States, 28 U.S.C. § 1345.

8. Venue is proper because Defendants are located or reside or do business in this district. 12 U.S.C. § 5564(f).

Parties

9. The Bureau is an independent agency of the United States charged with regulating the offering and providing of consumer-financial products and services under "Federal consumer financial laws." 12 U.S.C. § 5491(a). The Bureau is authorized to initiate civil actions in federal district court, by its own attorneys, to address violations of "Federal consumer financial law." 12 U.S.C. § 5564(a)-(b).

10. Future Income Payments, LLC, previously known as "Pension, Annuities and Settlements, LLC," was formed in April 2011 and is a limited-liability Delaware

company that has conducted business from 18300 Von Karman Avenue, Suite 410, Irvine, California 92612. Scott Kohn is or was the President, Secretary, and Treasurer of Future Income Payments. Future Income Payments transacts or has transacted business in this district and nationwide, extending consumer credit and servicing consumer loans. Future Income Payments is therefore a "covered person" under the CFPA. 12 U.S.C. § 5481(5), (6)(A), 15(A)(i).

11. FIP, LLC, is a Nevada limited-liability company, formed in 2016, that has conducted business from 2505 Anthem Village Drive, #E-578, Henderson, Nevada 89052. FIP, LLC, has two managing members, one of which is Cash Flow Outsourcing Services, Inc., based in the Philippines. Scott Kohn is the President of Cash Flow Outsourcing Services, Inc. FIP, LLC, transacts business nationwide, extending consumer credit and servicing consumer loans. FIP, LLC, is therefore a "covered person" under the CFPA. 12 U.S.C. §§ 5481(5), (6)(A), 15(A)(i).

12. Cash Flow Investment Partners LLC (www.lumpsum-settlement.com); Pension Advance LLC (www.pensionadvances.com and www.lumpsum-pensionloans.com); and BuySellAnnuity Inc. (buysellannuity.com), are or were limited-liability Delaware Companies that have operated out of 18300 Von Karman Avenue, Suite 410, Irvine, California 92612. They are or were marketing affiliates for Future Income Payments that are or were solely managed by Scott Kohn. They market or marketed the credit products that Future Income Payments provides and collect or collected the personal and financial information from consumers who express or expressed interest in the products.

13. These marketing affiliates are "covered persons" under the CFPA because they offer or have offered loans to consumers. 12 U.S.C. §§ 5481(5), (6)(A), 15(A)(i). They are also covered persons because they are under common control with and therefore affiliates of Future Income Payments and provide or have provided a material service to

Future Income Payments with respect to its extensions of consumer credit. 12 U.S.C. §§ 5481(1), (6)(B), 26(A).

14. The following Nevada limited-liability companies work or worked with Future Income Payments and are or were solely managed by Scott Kohn: Cash Flow Investment Partners East LLC; Cash Flow Investment Partners MidEast LLC; Lumpsum Pension Advance Atlantic LLC; Lumpsum Pension Advance Southeast LLC; Lumpsum Settlement West LLC; PAS California LLC; PAS Great Lakes LLC; PAS Northeast LLC; PAS Southwest LLC; Pension Advance Carolinas LLC; Pension Advance Midwest LLC; and Pension Loans South LLC. These companies have conducted business from 2505 Anthem Village Drive, #E-578, Henderson, Nevada 89052. They purport to acquire or purported to acquire income streams from consumers entitled to payments from pensions, annuities, legal settlements, or other similar sources. After subjecting consumers to an underwriting process, Future Income Payments provides lump sums to consumers in exchange for the consumers' promises to direct future payments, including fees, in equal installments for a set term to the aforementioned companies or to Future Income Payments.

15. The companies named in paragraph 14 are "covered persons" under the CFPA because they service consumer loans, 12 U.S.C. §§ 5481(6)(A), 15(A)(i). They are also "covered persons" because they are under common control with and therefore affiliates of Future Income Payments and provide or have provided a material service to Future Income Payments with respect to its extensions of consumer credit. 12 U.S.C. §§ 5481(6)(B), 26(A).

16. Scott Kohn is or was the President, Secretary, and Treasurer of Future Income Payments, and has, or had, managerial authority for that entity. In addition, Kohn is or was the sole manager of Cash Flow Investment Partners LLC; Pension Advance LLC; BuySellAnnuity Inc.; Cash Flow Investment Partners East LLC; Cash Flow Investment Partners MidEast LLC; Lumpsum Pension Advance Atlantic LLC; Lumpsum

Pension Advance Southeast LLC; Lumpsum Settlement West LLC; PAS California LLC; PAS Great Lakes LLC; PAS Northeast LLC; PAS Southwest LLC; Pension Advance Carolinas LLC; Pension Advance Midwest LLC; and, Pension Loans South LLC. Kohn has managerial responsibility for all of the Defendant entities. Under the CFPA, Kohn is therefore a "related person" to these entities. 12 U.S.C. § 5481(25)(C)(i). Because Kohn is a "related person," he is deemed a "covered person" for purposes of the CFPA. 12 U.S.C. § 5481(25)(B).

17. The true names and capacities of the Defendants sued herein as Does 1 through 100, inclusive, are unknown to the Bureau. The Bureau therefore sues these Defendants by such fictitious names. When the true names and capacities of these Defendants have been ascertained, the Bureau will seek leave to amend this Complaint to insert the true names and capacities of the fictitiously-named Defendants. The Bureau believes, and therefore alleges, that these Defendants participated in, and in some part are responsible for, the illegal acts alleged herein. Each reference in this Complaint to Defendants is also a reference to all Defendants sued as Does.

18. Defendants Future Income Payments; FIP, LLC; Cash Flow Investment Partners LLC; Pension Advance LLC; BuySellAnnuity Inc.; Cash Flow Investment Partners East LLC; Cash Flow Investment Partners MidEast LLC; Lumpsum Pension Advance Atlantic LLC; Lumpsum Pension Advance Southeast LLC; Lumpsum Settlement West LLC; PAS California LLC; PAS Great Lakes LLC; PAS Northeast LLC; PAS Southwest LLC; Pension Advance Carolinas LLC; Pension Advance Midwest LLC; Pension Loans South LLC; and, Does 1-100 (collectively, FIP) operate or operated as a common enterprise while engaging in the unlawful acts and practices alleged in the Complaint. FIP conducts or has conducted the business practices described below as interrelated companies that have or had a common manager and overlapping office locations. Because these Defendants have operated as a common enterprise, each of them is jointly and severally liable for the acts and practices alleged below. Individual

Defendant Kohn has or had managerial responsibility for the corporate Defendants that comprise the common enterprise.

Factual Background

A. Defendants' Scheme

19. The corporate Defendants are affiliated entities, led by individual Defendant Scott Kohn, that purport to purchase, through lump-sum payments, portions of consumers' future pension or other income streams at a discount.

20. FIP operates through a web of interconnected companies. The corporate Defendants operate interchangeably, often using each other's names and addresses.

21. According to Defendant FIP, LLC's website, futureincomepayments.com, FIP is "America's largest pension cash flow originator with over $150 Million in completed transactions."

22. Through advertisements, cold-calling, and email campaigns, FIP lures in vulnerable consumers in need of cash. FIP claims that the product it offers is useful for "[p]ay[ing]-off high-interest credit cards and debts[.]" Many military veterans, retirees, and their spouses have contracted with FIP.

23. FIP operates or has operated websites, including futureincomepayments.com, buysellannuity.com, pensionpurchasing.com, lumpsum-pensionloans.com, and lumpsum-settlement.com, to market and sell its product. Once a consumer contacts FIP, FIP's representatives apply significant pressure to consumers to quickly sign a contract.

B. FIP's Product, Fees, and Representations to Consumers

24. Since at least 2011, under various corporate names, FIP has marketed its product to consumers as the purchase and sale of a portion of the consumer's future pension or other income stream at a "discount" in exchange for an immediate lump-sum cash payment.

25. Consumers who contract with FIP are required to execute an agreement entitled "Purchase and Sale Agreement," or some variation thereof. These agreements purport to effect the sale of consumers' pensions or other future income streams to FIP.

26. Under FIP's contracts, consumers receive lump sums, ranging from $100 to at least $60,000, and are subsequently obligated to repay a larger total amount through a series of monthly payments, which they make when they receive their disability, pension, or other payments. Consumers make these payments over a prescribed period, typically 48, 60, or 120 months.

27. Many of the income streams that FIP contracts for are not legally assignable. *See, e.g.*, 29 U.S.C. § 1056(d); 38 U.S.C. § 5301.

28. Consumers who contract with FIP are required to agree to make automatic recurring payments from their bank accounts to FIP as a condition of receiving the money FIP provides.

29. In addition to its "Purchase and Sale Agreement," FIP requires consumers who contract with FIP to execute an "Authorization for Automatic Payment (Electronic Funds Transfer/EFT)" or equivalent document providing that they authorize FIP and their bank to initiate recurring debit entries as payment for the sale of an asset.

30. FIP does, in fact, exercise its right under these agreements to debit the amount of payments due from consumers from consumers' bank accounts.

31. In addition to the "discount" consumers are required to pay in exchange for the lump sum, FIP often subtracts fees, such as a $300 "one-time setup fee" from the lump sum, as well as a monthly "management fee" for the duration of the agreement.

32. Some consumers are also required to take out life-insurance policies and name FIP or a third-party future income-stream buyer (investor) as the beneficiary, to protect FIP in the event the consumer dies.

33. Consumers who fail to make a timely payment are charged a late fee of 1.5% of the delinquent payment. This amount accrues monthly, based on the total amount of

the delinquent payment, including any late payment fee from a previous month. Consumers are also charged an additional $25-$35 for any form of payment returned to FIP for non-sufficient funds, and some consumers may be charged for costs FIP incurs to collect the delinquent amount.

34. FIP operates throughout the United States, and has offered or provided its product to thousands of vulnerable consumers across the nation.

35. FIP repeatedly emphasizes to consumers online and in certain documents that its product is "a purchase and not a loan." FIP's contracts with consumers contain some variation of the title "Purchase and Sale Agreement" and, with slight variations, expressly assert that the "agreement is not a loan or other financing transaction, and neither Seller [of the future income stream] nor FIP intend this agreement to be regarded as a loan or other financing instrument."

36. Some of FIP's contracts also state that if "a court ever finds that the sale of the Purchased Asset was ineffective or that this Agreement created a loan rather than an absolute sale of the Purchased Asset, then this Agreement will serve as a security agreement under the Uniform Commercial Code or similar law of the state in which Seller resides."

37. On Defendant FIP, LLC's website, buysellannuity.com, there is a page dedicated to pensions. This Pension Payments page refers to FIP's team of "retirement loan professionals," who can help consumers "[s]implify the end-to-end process" by working with a "knowledgeable" team that specializes "in annuity buyout, individual retirement loans, and pension payment advances."

38. FIP also engages in underwriting and the collection of extensive information, guarantees, and documents before providing lump-sum payments to consumers. For example, FIP requires consumers to submit a variety of documents, including a benefits letter from the institution providing the income stream, a photo identification, personal or corporate tax returns if the consumer is self-employed, a W-9

form, and, if applicable, bank statements, proof of life insurance with death-benefit amount, a notarized spousal-consent form, a notarized agreement from the consumer's spouse that among other things requires the consumer's spouse to guarantee all of the consumer's obligations to the "buyer" of the future income stream, and an employment-verification form.

39. FIP claims that there is no interest rate associated with its product. Rather, FIP asserts, the difference between the lump sum consumers receive and the total amount they are required to pay represents a "discount." But what FIP calls a discount is in actuality a form of interest the consumer pays over the term of the agreement. FIP transactions cost consumers amounts that are equivalent to rates of up to 183%, and potentially more.

40. FIP's representatives also have led consumers to believe they can repay the lump-sum payment early and without penalty. In fact, many FIP contracts provide that the lump-sum payment cannot be prepaid. In many instances when consumers have been allowed to repay their loans early, they have been penalized.

41. Certain versions of FIP's contracts include clauses that bind the consumers' heirs, executors, administrators, successors, or assigns, require consumers to abide by the contract even if the consumer files for bankruptcy, and provide that if a consumer materially breaches the agreement all remaining and unpaid future periodic payments shall be immediately due and payable.

42. Under TILA, 15 U.S.C. § 1602(g), and Regulation Z, 12 C.F.R. § 1026.2(a)(17)(i)(2018), FIP is a creditor because it regularly extends consumer credit that is subject to a finance charge or is payable by a written agreement in more than four installments—and the obligation is initially payable to FIP.

43. FIP does not provide consumers the closed-end-credit disclosures required by TILA, 15 U.S.C. §§ 1601 *et seq.*, and Regulation Z, 12 C.F.R. §§ 1026.1 *et seq.*, such as disclosures of the "finance charge" and "annual percentage rate." FIP seeks to avoid

the requirements to provide such disclosures, which apply to closed-end-credit transactions, by labeling its transactions as "sales" rather than loans. In fact, however, FIP's transactions involve extensions of closed-end credit under TILA and Regulation Z.

44. FIP offers and provides the income streams from consumers to third-party investors, usually as 60- or 120-month cash flow payments, providing interest rates between 6% and 12% for their investment.

45. FIP presents investors with offers of cash-flow payments from specific consumers, providing on the offer sheet, among other information, the name of the consumer, the asset issuer, information about the cash flow, and the amount required to "purchase" that cash flow. It is from these "investments" that FIP raises the funds to provide contracting consumers with lump-sum payments. FIP solicits investors online and also receives referrals from financial advisors.

C. The Corporate Defendants' Common Enterprise

46. The collection of Defendant-companies operated by Scott Kohn does not operate at arm's length but rather functions as a common enterprise.

47. The entities share physical addresses, website URLs, and webpages, and Kohn manages them all.

48. As described above, each of the corporate Defendants plays a role in the common enterprise. Several of the Defendant-entities are marketing affiliates of Future Income Payments. *See* ¶ 12. These entities, as well as FIP, LLC, and Future Income Payments, provide or provided marketing services for the scheme as a whole. Other entities acquire or acquired income streams derived from various pensions, annuities, settlements, or like inflows, which are or were then serviced by Future Income Payments. *See* ¶ 14. Among a variety of administrative and other services that Future Income Payments provides or has provided to those entities that acquire or acquired income streams, it maintains and collects income-stream payments. This involves but is not

limited to sending statements and collecting payments from third parties, as well as initiating collection activity against those who fail to remit payments.

49. The corporate Defendants' actions and omissions as set forth herein include the actions and omissions of each Defendant-entity acting jointly and severally.

Count I

Deceptive Acts or Practices in Violation of the CFPA Against All Defendants

50. The Bureau realleges and incorporates by reference paragraphs 1-49 of this Complaint.

51. An act or practice is deceptive if it involves a material misrepresentation or omission that is likely to mislead consumers acting reasonably under the circumstances.

52. In marketing the loans in question, FIP routinely represents that the product:

a. is not a loan;

b. does not have an interest rate associated with it; and

c. is comparable to or cheaper than credit-card debt.

53. In fact, FIP's product is a loan, and what FIP claims is a "discount" is a form of interest associated with its product. In addition, FIP charges consumers the equivalent of rates up to 183%, and potentially more, which is far in excess of a high-interest credit card.

54. These material representations are false and misleading. Denying that FIP's product is a loan, that any interest rate applies, and that the cost of the loan is more than the cost of credit-card debt are material misrepresentations because they mischaracterize the nature of the product and render a reasonable consumer unable to compare the cost of the product with other potential sources of credit.

55. Therefore, Defendants have engaged in deceptive acts or practices in violation of the CFPA, 12 U.S.C. § 5536(a)(1)(B).

Count II

Violations of TILA

Against All Corporate Defendants

56. The Bureau realleges and incorporates by reference paragraphs 1-49 of this Complaint.

57. TILA and Regulation Z require that certain disclosures be provided to a consumer before consummation of a closed-end credit transaction. 15 U.S.C. § 1638(a)-(b); 12 C.F.R. §§ 1026.17(a)-(b)(2015), 1026.18(2015).

58. Among the required disclosures in a closed-end credit transaction are the finance charge and APR. 15 U.S.C. §§ 1602(v), 1638(a)(3)-(4); 12 C.F.R. § 1026.18(d)-(e).

59. The finance charge is generally "the cost of consumer credit as a dollar amount" and "includes any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit." 12 C.F.R. § 1026.4(a)(2011); *see also* 15 U.S.C. § 1605(a).

60. Regulation Z requires that a creditor in a closed-end credit transaction disclose the finance charge, "using that term, with a brief description such as 'the dollar amount the credit will cost you.'" 12 C.F.R. § 1026.18(d).

61. The APR is "a measure of the cost of credit, expressed as a yearly rate." 12 C.F.R. § 1026.22(a)(1)(2015); *see also* 15 U.S.C. § 1606(a).

62. Regulation Z requires that a creditor in a closed-end credit transaction disclose the APR, "using that term, with a brief description such as 'the cost of your credit as a yearly rate.'" 12 C.F.R. § 1026.18(e).

63. FIP provides consumers closed-end installment loans, which are subject to finance charges and for which an APR is required to be calculated and disclosed, but does not provide the disclosures required by TILA and Regulation Z. FIP therefore violated TILA and Regulation Z.

Count III

Violations of the CFPA

Against All Corporate Defendants

64. FIP's violations of TILA and Regulation Z alleged in Count II constitute violations of the CFPA. 12 U.S.C. § 5536(a)(1)(A).

PRAYER FOR RELIEF

Wherefore, the Bureau requests that the Court:

1. award injunctive relief as may be necessary to prevent consumer injury during the pendency of this action and to preserve the possibility of effective final relief;
2. permanently enjoin Defendants from committing future violations of the CFPA or any provision of "Federal consumer financial law," as defined by 12 U.S.C. § 5481(14);
3. grant additional injunctive relief as may be just and proper;
4. award damages or other monetary relief against Defendants;
5. order Defendants to pay redress to harmed consumers;
6. order disgorgement of ill-gotten revenues from Defendants;
7. impose civil money penalties against Defendants;
8. order Defendants to pay the Bureau's costs and fees incurred in connection with prosecuting this action;
9. appoint a receiver to assess the various claims of consumers and non-party investors; and
10. award additional relief as the Court may determine to be just and proper.

Dated: September 13, 2018

Respectfully submitted,

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